





2nd DIVISION

Abstract

General No. 11528

(Abstract only)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(Second Division)

OCTOBER TERM, A.D. 1961

(35 I.A. 21)

ELTEN M. KAY,

}

Defendant in the above cause,
An Illinois Corporation, and
Insulating Products Company,
an Illinois Corporation,

VOLUME 35

The Appellate Court of Illinois, in the above cause, in the cause
of Plaintiff, Elten M. Kay, and Defendants, Forty-Eight Insulations, Inc.,
an Illinois Corporation, and Insulating Products Company, an Illinois cor-
poration, Defendants, covers the marketing, promotion and sale of
'Acousti-core' and 'Acoustifelt' by Plaintiff, and that Plaintiff
under the terms of said written agreement, shall actively sell and

Elten M. Kay, Plaintiff, and Forty-Eight Insulations, Inc., an Illi-
nois corporation, and Insulating Products Company, an Illinois cor-
poration, Defendants, covers the marketing, promotion and sale of
'Acousti-core' and 'Acoustifelt' by Plaintiff, and that Plaintiff
under the terms of said written agreement, shall actively sell and
promote the sale of 'Acousti-core' and 'Acoustifelt', have charge of

— 33 —

General No. 11528

(Abstract only)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(Second Division)
OCTOBER TERM, A.D. 1961

(35 I.A. 21)

ELTEN M. KAY, }
Plaintiff-Appellee, } Appeal from the
vs. } Circuit Court of
FORTY-EIGHT INSULATIONS, INC., } Kane County
an Illinois Corporation, and }
INSULATING PRODUCTS COMPANY, }
an Illinois Corporation, }
Defendants-Appellants. }

SPIVEY--P. J.

The Circuit Court of Kane County entered an order in a declaratory judgment action declaring plaintiff's rights under a written contract of employment. Defendants appeal from an order adverse to their contention.

The order complained of after the making of findings of fact consistent with the decretal portion reads,

"It is therefor ordered, adjudged and decreed by the Court that the written agreement entered into on November 1, 1954, between Elten M. Kay, Plaintiff, and Forty-Eight Insulations, Inc., an Illinois corporation, and Insulating Products Company, an Illinois corporation, Defendants, covers the marketing, promotion and sale of 'Acousti-core' and 'Acoustifelt' by Plaintiff, and that Plaintiff under the terms of said written agreement, shall actively sell and promote the sale of 'Acousti-core' and 'Acoustifelt', have charge of

building a sales force therefor, and be entitled to receive the compensation therefor as provided in Paragraph 2 in said written agreement during the period from April 1, 1955 to April 1, 1965; and the Court hereby specifically orders and decrees that said 'Acousti-core' and 'Acoustifelt' are 'building insulations' under the terms of said written agreement."

The written agreement provides,

"November 1, 1954

Mr. Elten M. Kay
P. O. Box 20
Elgin, Illinois

Dear Elten:

Our Agreement which has covered the seven years from April 1, 1948, is about to expire and this will confirm our new arrangement under which you will continue in charge of building insulation sales. It includes the provisions we discussed together; I will sign it and leave space for you to acknowledge your acceptance by your signature.

1. It is agreed that you will actively sell and promote the sale of building insulations and allied building insulation products and that you will have charge of building a sales force for Forty-Eight Insulations, Inc., the policies and the commissions and terms of employment of salesmen to be determined by the company.
2. It is agreed that your compensation will be as follows:
 - (a) Where we do not have a salesman in a territory and wherein the sales are handled direct by you, we will pay you a commission on the net sale, after freight, discounts and allowances, of $3\frac{1}{2}\%$ for batts and enclosed blankets and 5% on the other items which are understood to come under the head of 'building insulations', e.g. blowing wool and perimeter insulation.



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(b) In those areas wherein we place one or more salesmen as we build our sales force, you will be paid a 3% commission on the net sales after freight, discounts and allowances with no product distinction as above, e.g. batts and blanket insulation, blowing wool and perimeter insulation, up to \$2,000,000 annually, and your commission will be 2% on such net sales over \$2,000,000 annually.

(c) It is understood that all expenses are to be borne by you, except those from time to time specifically authorized by the company, for such things as literature, trade paper advertising, particular sales meetings.

3. We acknowledge and recognize that you have outside interests, to which we have no objection so long as they are not in competition with and do not interfere with the active promotion and sale of our products by you or in the building and functioning of a sales force for Forty-Eight Insulations, Inc.

4. It is agreed that this agreement is to last from April 1, 1955 for ten years to April 1, 1965.

FORTY-EIGHT INSULATIONS, INC.

(signed) Victor von Schlegell, Jr.
President

Accepted:

(Signed) Elten M. Kay

Insulating Products Company agrees that the terms of this agreement will apply to the sale of building insulations which might be manufactured by any other manufacturing subsidiary of Insulating Products Company.

INSULATING PRODUCTS COMPANY

(signed) Victor von Schlegell, Jr.
President"

The prior seven year agreement referred to in the agreement of November 1, 1954, is as follows,

"March 29, 1948

Mr. E. M. Kay
7135 W. Bryn Mawr Ave.
Chicago 31, Illinois

Dear Mr. Kay:

This is to confirm our oral agreement that you agree to enter into the employ of Forty-Eight Insulations, Inc., for a period of seven years from April 1, 1948, and Forty-Eight Insulations, Inc. agrees that it shall hire you for a period of seven years from April 1, 1948 subject to the terms and conditions hereinafter set forth.

1. You are to have the title of vice-president of Forty-Eight Insulations, Inc.
2. Your work is to promote the sale of home insulation-- i.e. granulated wool, insulation blankets, insulation batts, ventilating louvers, insulation blowing machines and their accessories and other similar items as are reasonably tributary to the foregoing items.
3. Your income is to be computed as follows:
 - (a) You are to receive $1\frac{1}{2}\%$ of the gross home insulation sales (less freight paid by the company on home insulation sales) made outside a radius of 600 miles of Aurora, Illinois, provided, that if the total gross home insulation sales (less freight paid by the company on home insulation sales) outside such radius exceed \$500,000. you are to receive $2\frac{1}{2}\%$ of such excess. In addition, you are to be reimbursed by the company for all expenses incurred by you in connection with all home insulation sales made outside a radius of 600 miles of Aurora, Illinois.

(b) On all sales of insulation batts and insulation blankets made within a radius of 600 miles of Aurora, Illinois you are to receive 3% of all such gross sales (less freight paid by the company thereon). In addition, you shall be reimbursed for all expenses incurred by you in connection with such sales except the expenses of transportation, meals and lodging.

(c) On all sales of granulated wool made within a radius of 600 miles of Aurora, Illinois, you are to receive 7½% of all such gross sales (less freight paid by the company thereon). In addition you shall be reimbursed for all expenses incurred by you in connection with such sales except the expense of transportation, meals and lodging.

(d) On all other sales not covered by sub-paragraphs (a), (b) or (c) of this paragraph 3., you are to receive such percentage as shall be determined by the mutual agreement of yourself and the company.

4. Should we decide to operate the Forty-Eight Engineers, Inc., you are to have the privilege of purchasing an interest therein, to be agreed upon between us. It is the present intention to keep the Forty-Eight Engineers dormant.

5. We understand that you own the E. M. Kay Company, and it is understood that you have the privilege of operating this company so long as it does not interfere with our business.

6. The life of this agreement is to be seven years from April 1, 1948. It may, of course, be terminated at any time by mutual agreement of the parties hereto. If this agreement with the foregoing terms and conditions meets with your approval, signify your acceptance of the same by signing in the place indicated below. You will note that the approval of this agreement on the part of the corporation

has been indicated by the signature of the president thereof and the attestation of the assistant secretary.

Yours very truly,

FORTY-EIGHT INSULATIONS, INC.

By Victor von Schlegell
President

Attest:

Assistant Secretary

E. M. Kay

(Seal)"

Appellants' primary theory for reversal is based upon the argument, that the court erroneously applied certain accepted rules of contract construction, resulting in an order that is both against the manifest weight of the evidence and the law. Threaded throughout their argument, these rules have been applied to a basic argument that the agreement does not contemplate any kind of products developed and manufactured subsequent to November 1, 1954, and in particular Acousti-core and Acoustifelt.

The evidence, consisting of testimony and exhibits, reveals a minimum of conflict.

Toward the termination date of the 1948 agreement, the parties had some discussions about a renewal of their contract of employment. These conversations resulted in the 1954 agreement. Prior to these conversations Kay had advised the company that he was leaving upon completion of his agreement, to become president of another company. However, he was induced to remain and to enter into the instant agreement. The new agreement provided Kay with increased sales which would result in greater income to him even though he would receive smaller actual commissions per unit sale.

During the 1948 agreement, Kay had on many occasions sponsored the inclusion of a line of products to be sold as

acoustical insulation. He had in fact formed a company for the manufacture and sale of a spray on acoustical and thermal insulation. The basic ingredient of this spray was purchased from defendant. Kay's activity in this regard was permitted under his agreement with defendant.

The idea of Acousti-core and Acoustifelt was brought to the company in 1958 by a Mr. Ray Capaul. These products contain the same basic core as the other insulation products sold by the defendant. They differ only in density and covering. The machinery necessary to manufacture these products amounted to a substantial capital investment.

Acousti-core and Acoustifelt as well as the other insulation products of defendant have and were so advertised as having both acoustic and thermal properties. All of defendants' insulation products except Acousti-core and Acoustifelt are sold under the direction of Kay's department. All of defendants' products serve the dual purpose of thermal and acoustical insulation.

Kay in testifying stated that in their discussions before the execution of the agreement the meaning of the term "building insulation products" was mentioned but that he could not recall specifically any conversation about sound control products and that in these discussions the concept and language was much broader than that of the contract.

Victor von Schlegell, Jr., president of defendant company, testified that at the time of the signing of the 1954 agreement he did not recall any discussion at all concerning acoustical products.

It has long been the established law of this state that in a trial without a jury the findings and judgment of the court will not be disturbed on review unless they are contrary to the manifest weight of the evidence or the law.

The court has had the opportunity to observe the witnesses and their conduct and demeanor while testifying and to hear their spoken words and can give their testimony such weight as it warrants.

While in the instant case the evidence was not in substantial conflict, yet insofar as it was helpful in determining the true intent of the parties to the agreement, the weight was for the court to decide. We can only observe that the testimony of the lone witness on behalf of the defendants appears evasive, unresponsive, confusing and uninformative.

Defendants' president was the scrivener of this contract of employment. It is succinctly stated in I. L. P. Contracts, Sect. 221, "Words which are ambiguous or of doubtful construction are to be construed most strongly against the party who prepared the contract, for the reason that he chose the language and is responsible for the ambiguities in his own expression."

The obvious purpose of the new agreement was to employ plaintiff to head up the company's sales of building insulations and to personally sell those products. Kay was further charged with "building a sales force for Forty-Eight Insulations, Inc." as an entity without limitations.

In fixing his compensation where there was no salesman in the territory the agreement reads, "3½ for batts and enclosed blankets and 5% on the other items which are understood to come under the head of 'building insulations', e.g. blowing wool and perimeter insulation." (Emphasis supplied).

The items expressly enumerated are the same items that were being sold by plaintiff under his prior agreement. The differentiation in the commission is also provided in the earlier agreement.

In the use of the word "understood" in fixing the commission to be paid on other items of building insulation other than batts and enclosed blankets, which are also building insulations, we find no forced

or unreasonable interpretation in holding that it includes all building insulations recognized as insulations, whether acoustical or thermal.

"'Understood' is a word of many meanings and a verb of very exhaustive signification." Davis v. Schnell, D. C. Ala. 84 F. Supp. 272.

Then, too, the use of the abbreviation "e.g." meaning "for example" by the scriviner in describing other items of building insulations is significant. By the use of the abbreviation he did not limit building insulations to the specific enumerations as he had in the prior agreement in using the abbreviation "i.e.", meaning "that is" in describing the word insulation.

Webster's New International Dictionary, Second Edition, Unabridged (1957) in defining the word insulate states, "to separate from conducting bodies by means of non conductors, as to prevent transfer of electricity, heat or sound." (Emphasis supplied.)

It was said in the case of Close v. Browne, 230 Ill. 228, 82 N.E. 629, " * * * the court will endeavor to place itself in the position of the contracting parties, and read the instrument in the light of the circumstances surrounding them at the time it was made and of the objects which they then evidently had in view, so that the court may understand the language used in the sense intended by the parties using it."

Considering the language of the instant agreement in a light most favorable to the plaintiff, the prior working agreement, the nature and character of the products and the surrounding circumstances, we conclude that the findings and order of the trial court were neither against the manifest weight of the evidence nor the law.

It is suggested by appellant that the court erred in excluding certain evidence offered on behalf of defendants, which evidence went to the ultimate issue of the case. Even if we felt that the court erred in this regard it should be treated as harmless in that the evidence as abstracted reveals that an almost identical question had been answered.

The order of the Circuit Court of Kane County is affirmed. Crow, J., and Wright, J., concur.

Affirmed

Abstract

No. 11560

Publish Abstract Only

Agenda 2

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, SECOND DIVISION

FEBRUARY TERM, A. D. 1962

(35 I.A. 2 L)

WALTER MERZIG,)
Plaintiff-Appellee,)
vs.)
ARTHUR CIBIS and ALAN FISHER,)
Defendants,)
ALAN FISHER,)
Certain Defendant-Appellant.)
Appeal from the
Circuit Court of
Kane County.

WRIGHT -- J.

The plaintiff, Walter Merzig, commenced a suit in the Circuit Court of Kane County for damages for breach of a written contract against the defendants, Arthur Cibis and Alan Fisher, for improperly laying floor covering in the home of the plaintiff. The case was tried before the trial court, without a jury, and a judgment was entered finding both defendants guilty and assessing the damages of the plaintiff at \$555.00. The defendant, Alan Fisher, alone appeals from

this judgment contending that as a matter of law, he was not a party to the written contract between the plaintiff, Walter Merzig, and the defendant, Arthur Cibis.

The complaint alleges in substance that the plaintiff entered into a written contract with the defendant, Arthur Cibis, for the purchase of a certain lot and a house in the process of construction which was located thereon; that the contract provided for the completion of the house in accordance with the standards therein mentioned; that Alan Fisher was the sub-contractor employed to lay the floor in the above premises; that the plaintiff has duly performed his conditions of the contract; that defendants, Arthur Cibis and Alan Fisher, have failed to complete their contract relating to the flooring of said house; that after plaintiff went into possession he determined that Alan Fisher had improperly laid the flooring with the consent and advice of the defendant, Arthur Cibis; that Arthur Cibis agreed to pay the plaintiff all costs incurred, and that plaintiff did have to install a new floor all to his damages. The contract is attached to the complaint and made a part thereof by reference. The written contract is signed and executed by the plaintiff and his wife and by the defendant, Arthur Cibis, and his wife. The defendant, Alan Fisher, was not a party to this written contract and did not

sign it.

The defendant, Arthur Cibis, was a general contractor who built most of the houses in a sub-division known as Rainbow Hills, located near the City of St. Charles, Illinois. The defendant, Alan Fisher, was in the floor covering business and was employed by the defendant, Arthur Cibis, as a sub-contractor to lay the flooring in most of the houses built by the defendant, Arthur Cibis. Sometime in the spring of 1957, defendant, Alan Fisher, contracted with the defendant, Arthur Cibis, to install the floor covering in the home ultimately purchased by the plaintiff.

At the time plaintiff purchased his home, the floor covering had not yet been installed in the bathroom, kitchen, vestibule and dining area. Arthur Cibis told plaintiff and his wife to go to Alan Fisher's store to choose the floor covering they desired for these areas. At the direction of the defendant, Arthur Cibis, the plaintiff and his wife did go to the store of the defendant, Alan Fisher, and selected a particular type of floor covering.

There is considerable conflict in the evidence as to the conversation that transpired between plaintiff, his wife, and defendant, Alan Fisher, at the time the floor covering was selected at the store of the defendant, Alan Fisher. Fisher testified that the plaintiff and his wife did not ask him

what type of flooring should be used in their home, nor did they ask him to make any suggestions but only wanted to know what type of floor covering they could obtain for the price that the defendant, Arthur Cibis, was willing to pay.

The plaintiff and his wife testified that they were very unfamiliar with flooring, linoleum or tile type and that they relied upon the advice of the defendant, Alan Fisher, in selecting the type of floor covering which was eventually selected. Plaintiff and his wife testified that the defendant, Alan Fisher, suggested and recommended to them a particular type of floor covering and told them that it was an extremely good type and that "it would outlast the house." This particular type of floor covering was finally agreed upon and installed in the home of the plaintiff by the defendant, Alan Fisher.

A few months after the installation of the floor covering, it became very unsatisfactory and began to cut and crack and to bleed mastic. The plaintiff and his wife immediately reported this fact to the defendant, Arthur Cibis, who in turn informed the defendant, Alan Fisher, that the installation of the floor covering in plaintiff's house was very unsatisfactory.

Defendant, Arthur Cibis, testified that in his opinion the flooring was not properly installed and would have to be replaced, but that the defendant, Alan Fisher, refused to

replace the flooring. Cibis further testified that he told the plaintiff to go ahead and have the floor replaced and that he would pay for it. The plaintiff contracted with the Carswell Floor Covering Company of Elgin, Illinois, to replace the floor covering and the Carswell Floor Covering Company of Elgin, Illinois, pursuant to the contract with the plaintiff, replaced the floor covering at a cost of \$555.00. Defendant, Cibis, further testified that he had authorized the replacement of the floor covering by the Carswell Floor Covering Company, and that he would pay for the new installation and then proceed against defendant, Alan Fisher, for the cost of replacement.

Defendant, Alan Fisher, never agreed to pay anything to anyone for the replacement of the floor covering. Although the defendant, Arthur Cibis, has agreed both with the Carswell Floor Covering Company and the plaintiff to pay for the new flooring, he never did.

The complaint in this case is based upon a breach of a written contract for the conveyance of land and the improvements thereon. The defendant, Alan Fisher, cannot be charged for a breach of this written contract unless he signed the contract personally or by an authorized agent. Statute of Frauds, Ch. 59, Sec. 2, Ill. Rev. Stat., 1959. The defendant, Alan Fisher, was not a party to this written contract. He

did not sign it and, in fact, his name was not even mentioned in it. It necessarily follows that he cannot be liable for a breach of the written contract. The writing required by the Statute of Frauds must be signed by the party to be charged or by some other person lawfully authorized by him. 20 I.L.P., Frauds, Statute of, Sec. 75.

There is nothing in the record before us to indicate that defendant, Alan Fisher, entered into any contract, either written or oral, with the plaintiff to install floor covering in plaintiff's house. The agreement, if any, under which defendant, Fisher, installed the floor covering in plaintiff's house was made with defendant, Cibis, and if there was a breach of such an agreement, the defendant, Cibis, would be the proper person to proceed against Alan Fisher.

The plaintiff, in his brief, contends that in the event that this court reverses the judgment appealed from, that this cause should be remanded so that the Circuit Court of Kane County may enter an order finding that the defendant, Arthur Cibis, should be adjudged liable to the plaintiff, Walter Merzig, in the amount of \$555.00, and to the defendant, Alan Fisher, in the amount of \$236.00 and that the defendant, Alan Fisher, in turn is indebted to the defendant, Arthur Cibis, in the amount of \$555.00.

These matters are not before this court for review on appeal. There are no cross appeals filed herein. The only issue before this court is whether or not the judgment of the plaintiff against the defendant, Alan Fisher, should be affirmed or reversed.

The plaintiff's motion to dismiss the appeal, which was taken with the case, is hereby denied.

The judgment of the Circuit Court of Kane County, Illinois, finding defendant, Alan Fisher, guilty and assessing the damages of plaintiff, Walter Merzig, in the sum of \$555.00 is reversed.

JUDGMENT REVERSED.

SPIVEY, P. J. and CROW, J. Concur.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A. D. 1962

RAY R. MARCUM AND
PAUL DALLAS MILLER,
Plaintiffs-Appellants,

(35 I.A. 29)

vs.

ROBERT G. DAUGHERTY,
Defendant-Appellee,

.....

ROBERT G. DAUGHERTY,
Counter-Claimant-Appellee,

vs.

RAY R. MARCUM AND
PAUL DALLAS MILLER,

Counter-Defendants-Appellants.

Appeal from the

Circuit Court of

Winnebago County.

CROW, J.

This is an automobile negligence case which arose out of a three car collision at or near the intersection of 11th and Reed Streets in Rockford, on November 27, 1959, at or about 5:45 p.m. The plaintiffs, Ray R. Marcum and Paul Dallas Miller, filed their complaint, consisting of two counts, the first for Marcum's alleged property damages and the second for Miller's alleged personal injuries, against the defendant, Robert G. Daugherty. The defendant filed an answer denying the allegations in the complaint and also filed a counterclaim for his alleged personal injuries and property damages against the plaintiffs. The plaintiffs-counter-defendants filed an answer to the counterclaim denying its allegations. The verdict found the defendant not guilty as to the com-

plaint and found the counterdefendants guilty as to the counter-claim and assessed damages of \$3,000.00. The plaintiffs-counter-defendants' post trial motion for new trial or judgment notwithstanding the verdict was denied. They have appealed from the judgments on the verdicts. The appellants urge that (1) the Court erroneously refused the plaintiffs' instruction No. 6, and (2) the verdicts are against the manifest weight of the evidence.

The complaint alleged that the plaintiff Ray R. Marcum was the owner of a 1951 Studebaker sedan which was being driven by George McCabe, and the plaintiff Marcum was also the owner of a 1947 International pickup truck driven by the plaintiff Paul Dallas Miller, both of which vehicles were travelling south on 11th Street at about 10 m.p.h. preparatory to making a right turn; the defendant, Robert G. Daugherty, was the owner and operator of a 1953 Studebaker, driving in a southerly direction on 11th Street and at that time and place he by his negligence caused his 1953 Studebaker to come in contact and collide with the pickup truck thereby causing the truck to collide with the 1951 Studebaker driven by McCabe. The acts of negligence on the part of the defendant charged in the complaint are:

- (a) failing to maintain a proper lookout for other persons lawfully travelling on the highway;
- (b) failing to properly apply his brakes to avoid colliding with the plaintiff's International truck;
- (c) failing to have his car under control;
- (d) driving into the rear end of plaintiff's International truck while it was lawfully operating on a public street in the County of Winnebago and State of Illinois.

The counterclaim of the defendant against the plaintiffs alleged that at or about 5:30 p.m., on November 27, 1959, he was driving his 1953 Studebaker in a southerly direction on 11th Street,

approaching the entrance to Superior Auto Sales, owned and operated by the plaintiff Marcum, at 2845 11th Street, Rockford; at that time and place the counterdefendant Marcum, by his agent, George McCabe, backed a 1951 Studebaker sedan from the entranceway northerly into the path of the counterclaimant's vehicle, and the counterdefendant Miller, at or about such time, also backed an International pickup truck from the entranceway in a northerly direction on to 11th Street in the path of the counterclaimant's vehicle, at a time when it was not reasonably safe to enter the highway, and as a direct and proximate result of those acts of the counterdefendants the automobile of the counterclaimant collided with the 1947 International truck driven by the counterdefendant Miller. The acts of negligence on the part of the counterdefendants charged in the counterclaim are:

- (a) failing to keep a proper lookout;
- (b) failing to yield the right-of-way to the automobile of the counterclaimant approaching the driveway along the through highway in violation of CH. 95½ ILL. REV. STATS., 1959, par. 168;
- (c) backing their vehicles along the through highway when such could not be done with reasonable safety, etc. in violation of CH. 95½ ILL. REV. STATS., 1959, par. 189a;
- (d) otherwise so negligently drove their vehicles as to cause the counterplaintiff's automobile to collide therewith.

The plaintiff Marcum owned and operated the Superior Auto Sales lot at the northwest corner of 11th and Reed Streets, Rockford. The plaintiff Miller was a part time employee of Marcum as a repairman. George McCabe was a full time employee of Marcum. Emris Cassady was a part time employee of Marcum as a salesman. There is an entranceway to the lot from 11th Street and also from Reed Street. There is no fence around the lot and no ditch between the lot and

the highway (11th Street). Route 51 goes down 11th Street. The street lights were on when this incident occurred. The street was dry.

The plaintiffs had three witnesses who testified to substantiate their factual contentions, namely, the plaintiff Miller, George McCabe, and Emris Cassady. The defendant, though not unconscious, suffered a head injury and a loss of memory relative to most of the events preceding the collision. The principal witness for the defendant was Albert Davis who drove a truck for Kelley-Williamson Oil Company. The versions of the facts by the witnesses for the plaintiffs and defendant, as to the manner in which the accident occurred, are irreconcilable.

The plaintiff Miller said he arrived at the Marcum lot about 5 p.m. to do a tune-up job; the lot lights were on; he saw no one; he got the keys to a Marcum International pickup truck, and drove it to get something to eat; he went west on Reed Street to the first north-south street, then north two blocks, then east one block to 11th Street, then south on 11th; as he approached the car lot he slowed down for traffic; a Studebaker was in front of him, going south, about 10 m.p.h. (driven, as he later learned, by McCabe); Miller in the pick-up truck, McCabe in the Studebaker, and a car to Miller's rear (driven as he later learned by Daugherty, the defendant), and a big truck which was following the defendant (presumably driven by Albert Davis) were all driving south in the southbound lanes; he saw defendant's car in his rear view mirror, it had its lights on, he first saw the lights of defendant's car about 3/4 of a block from the point of impact, and it was coming up awfully fast and at about that instant something hit the pickup truck in the rear, at about the drive into the car lot, about 50 feet north of Reed Street; the pickup truck then struck the McCabe driven Studebaker in front as that Studebaker was about to turn right on

Reed Street. After the accident he went back and a lady was with the defendant. Miller talked with the truck driver, Albert Davis, who had pulled around the defendant's car afterwards.

McCabe said he turned the lights on at the car lot about 5 p.m.; a 19 or 20 year old boy who is not on the payroll but who helps out once in awhile was in the office on the lot; he did not see the plaintiff Miller until after the accident; he drove a Marcum 1953 Studebaker off the lot, to test it, around the block, i.e., west, then north, then east to 11th Street, then south down 11th Street; the lights on that car were on; the collision occurred at a point about 40 feet from the center of the car lot; the car he was driving was hit on the left rear fender and bumper by the truck he later learned was driven by the plaintiff Miller, and, though damaged, it was in running condition afterwards.

Emris Cassady said that at about 5:45 p.m. on November 27, 1959, he was coming back to the car lot from Skeets Drive-In across the street (11th Street) and about four lots north of Marcum's auto sales lot; he had been at the car lot sometime after 5 p.m. and had then gone for coffee; he had had coffee and was waiting to cross the street back to the car lot when the Studebaker, which he later learned was driven by the defendant, ran into the rear of the pickup truck, which he later learned was driven by the plaintiff Miller, and the pickup truck then ran into the rear of another Studebaker which he later learned was driven by McCabe; he did not notice the defendant's car coming down the street prior to the collision; he looked up just as the defendant's car hit the back end of the truck; at the moment of the first impact, the pickup truck was not in contact with the Studebaker driven by McCabe, - the distance between these cars was 10 to 15 feet, and the pickup truck was almost in front of

the 11th Street entrance to the Superior Auto Sales lot, which was about 50 feet from the corner of 11th and Reed Streets when it was struck by the defendant's car, and at that time the Studebaker driven by McCabe was almost at the corner of Reed and 11th Streets.

The defendant Daugherty testified that on November 27, 1959, at about 5:45 p.m., he was driving a 1953 Studebaker in the right hand lane, next to the curb, going south on 11th Street in front of the Superior Auto Sales lot; all he can remember about the accident is that a pickup truck was "right there in front of me", - the truck was right on his radiator. He remembered that he turned off the lights and ignition after the accident; the front end of his car struck the rear of the pickup truck; a big truck pulled around his car after the accident. A woman came to his car and helped him; she put a towel around his head; she told him to lay his head back on the seat.

Albert Davis, the principal witness for the defendant, testified that he did not previously know any of the drivers of any of the vehicles involved; on November 27, 1959, he was driving a truck for Kelley-Williamson Oil Company at or near the 2800 block on 11th Street when an accident occurred which he witnessed; this accident happened at or near the used car lot in question; just prior to the accident he was driving south on 11th Street; it was dark and the lights were burning on his truck. Before the accident he saw a Studebaker in front of him for quite a ways on 11th Street. This car had passed him, and then he followed it at a speed of about 30 miles an hour, and this Studebaker was about 200-300 feet from his truck when the accident occurred right at the car lot driveway. He testified - "I don't know what the name was -- they pushed a car out in the street, and it looked to me -- I don't know -- as they

were going to give the car a push with the pickup truck, and they pushed the car back in the street, and as it was pushed in the street the pickup truck came out in the street further north and back in the street and headed farther to run up to the, run up to the pickup truck, and by the time he got stopped the car hit the pickup from the rear, and pushed it into the other car." The distance between the Studebaker driven by the defendant and the pickup truck, which he later learned was driven by the plaintiff Miller, when the truck first pulled out on the highway was 25 to 30 feet, and the collision between the defendant's Studebaker and the pickup truck occurred at the driveway into the used car lot. An old Studebaker (of Marcum's), he said, was pushed out by 3 or 4 people and stopped, and the truck (of Marcum's) came out of the car lot driveway almost at the same time and then shot forward 10 to 12 feet and stopped to push the old Studebaker, which did not move until it was hit by the pickup truck, and the defendant's Studebaker driven by the defendant skidded about six feet before the accident. Davis said that after the accident he pulled around the cars and across the intersection south of the car lot, that he talked to McCabe, and told him that they pushed the Studebaker into the street, and McCabe said that the other fellow (the defendant) was speeding, and that he (Davis) stated that the other fellow was not speeding, and he had been following the defendant. Davis said he went to the first house north of the car lot to call an ambulance and the lady said she'd already called the police and ambulance and that lady spoke English. After the accident the Marcum Studebaker was pushed around the corner on Reed Street, not under its own power. The defendant had towels around his head to keep the blood from flowing.

The plaintiff Marcum in rebuttal said the lady in the house immediately north of his car lot was his landlady; she is the lady referred to by Albert Davis; and she does not speak English.

In their post trial motion, the plaintiffs urged that the testimony of Albert Davis was false and in support thereof attached the affidavit of Camille DeVlieger and Clementine DeVlieger, his wife, that on November 27, 1959, at about 5:45 p.m. they heard a crash outside their front door, went to their front porch, and saw three vehicles which had been in a collision, they remained on their front porch the entire time until the vehicles were removed, at no time did anyone come to their door and ask to use their telephone to call the ambulance or otherwise, no woman was present at the scene of the accident, no woman placed a towel around the defendant's head, and they had a clear view of the entire scene.

The plaintiffs' refused Instruction No. 6, I.P.I. No. 60.01, is as follows:

"The Court instructs the jury that there was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that:

'The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.'

If you decide that Robert G. Daugherty violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether Robert G. Daugherty was guilty of contributory negligence or negligence before and at the time of the occurrence."

CH. 95½ ILL. REV. STATS., 1959, par. 158, provided, in part:

"(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon (and) the condition of the highway."

Supreme Court Rule 13, CH. 110 ILL. REV. STATS., 1959, par.
101.13, provides, in part:

"(1) If a breach of statutory duty is alleged, the statute shall be cited in connection with the allegation."

As the plaintiffs urge, each party has the right to have the jury instructed upon his theory of the case if it has a basis in the pleadings and evidence upon which to rest, and it is not necessary that the hypothetical case stated in an instruction be fully sustained by the evidence but only that there be evidence tending to sustain such: CHICAGO UNION TRACTION CO. v. BROWDY (1903) 206 Ill. 615; CHICAGO, R. I. AND P. RY. CO. v. LEWIS (1884) 109 Ill. 120. But, it is a fundamental rule of pleading that recovery can be had only on the negligence charged in the complaint, and an instruction directing the attention of the jury to an element of liability not shown by the pleadings, or evidence, is misleading and erroneous: LYONS v. RYERSON AND SON (1909) 242 Ill. 409; RATNER v. CHICAGO CITY RY. CO. (1908) 233 Ill. 169; HERRING v. C. AND A. R.R. CO. (1921) 299 Ill. 214; KUNZ v. LARSON (1957) 15 Ill. App. (2) 126. Instructions must be confined to the issues in the case: I. C. R.R. CO. v. SANDERS (1897) 166 Ill. 270. Instructions must be predicated on the evidence: WARNES etc. v. CHAMPAIGN COUNTY SEED CO. et al. (1955) 5 Ill. App. (2) 151; WELCH v. N. Y. C. AND ST. L. R.R. CO. (1955) 5 Ill. App. (2) 568; and it is error to give an instruction not based on evidence: MCCLEAN v. CHICAGO G. W. RY. CO. (1954) 3 Ill. App. (2) 235; Cf. C. R. I. AND P. RY. CO. v. LEWIS (1884) 109 Ill. 120.

The complaint here does not allege the defendant's motor vehicle was following the pickup truck driven by Miller, or was following it more closely than was reasonable and prudent, or what the speed of the defendant's vehicle was, or what was the state of the traffic, or what was the condition of the highway. The complaint



does not cite any statute in connection with any allegation. The failure to do so is not only a noncompliance with Rule 13 if the plaintiffs had intended to allege a breach of statutory duty but is strongly persuasive that the plaintiffs did not intend to allege any breach of statutory duty. The allegations that the defendant negligently caused his car to come in contact and collide with the pickup truck and that he was negligent in driving into the rear end of the pickup truck while it was lawfully operating on a public street are parts of an alleged breach of an alleged common law duty. They do not contain any of the essential elements or allegations of a breach of statutory duty under CH. 95½ ILL. REV. STATS., 1959, par. 158. The tendered instruction was outside and beyond the negligence charged in the complaint. It was not confined to an issue in the case. It would have been misleading and erroneous. The defendant sufficiently stated the substance of this objection to the tendered instruction at the conference on instructions and is not precluded from urging such here.

Further, there was no evidence upon which to base the giving of the tendered instruction. No one testified that the defendant's motor vehicle was following the pickup truck, within the meaning of CH. 95½ ILL. REV. STATS., 1959, par. 158, or how closely, or as to the distance between those vehicles except at some isolated point not relevant to the occurrence. That there may be evidence the defendant drove his vehicle into the rear of the pickup truck is not in itself any proof the defendant was following the pickup truck more closely than was reasonable and prudent, within the meaning of that statute. Miller said, in substance, that he first saw the lights of defendant's car in his rear view mirror about 3/4 of a block from the impact, it was coming up awfully fast, and about that

instant something hit the pickup truck in the rear. McCabe had nothing to say on this particular matter. Cassady did not notice the defendant's car coming down the street prior to the collision, - he looked up just as the defendant's car hit the back end of the truck. The defendant only remembers the pickup truck was "right there in front of me", - it was right on his radiator. Davis said, in substance, the pickup truck backed into the street from the entranceway, went forward, then stopped, the distance between the defendant's car and the pickup truck when the truck first pulled out on the highway was 25-30 feet, the defendant's car skidded about 6 feet before the accident, and then hit the pickup truck in the rear. None of that is sufficient evidence upon which to predicate the giving of this tendered instruction.

Accordingly, there was no error in refusing the plaintiffs' tendered instruction No. 6.

The evidence discloses that there were two wholly different and conflicting versions of the facts as to how the accident happened, - one told by the three witnesses for the plaintiffs, the other told by the defendant in part and a witness for the defendant who had no connection with the case and who was unacquainted with the plaintiffs or the defendant. The defendant urges the verdicts are not contrary to the manifest weight of the evidence, and we agree. The determination of the weight and preponderance of the evidence, the credibility of the witnesses, and the drawing of legitimately possible and reasonable inferences and conclusions from the facts in evidence fundamentally are jury functions, with which we will not interfere unless the verdict is against the manifest weight of the evidence: MANION v. C.R.I. and P. RY. CO. et al. (1956) 12 Ill. App. (2) 1; CLOUDMAN et al. v. BEFFA et al. (1955) 7 Ill. App. (2) 276.

The jury had the opportunity to observe the conduct and demeanor of the witnesses, their fairness, or lack thereof, and to weigh and determine their interest, or lack thereof, if any, in the result, and where the evidence is in sharp conflict, as here, we will not ordinarily consider the verdict to be against the manifest weight of the evidence unless it is clearly so: DEJNY v. DORR et al.

(1948) 333 Ill. App. 581. An able and experienced trial judge has denied the plaintiffs' post trial motion and permitted the verdicts to stand, and, under the circumstances, it is not our province to substitute our judgment: BLISS v. KNAPP (1947) 331 Ill. App. 45.

The judgments, therefore, are affirmed.

A F F I R M E D .

Spivey, P. J., and Wright, J., Concur

Abstract

Gen. No. 11596

Agenda 13

IN THE
APPELLATE COURT OF ILLINOIS 2nd DIVISION
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A. D. 1962

PEOPLE OF THE STATE OF ILLINOIS, ex rel. ROBERT HANNAWELL,
plaintiff-appellee, } (35 I.A. 210)
vs. } Appeal from the
NEAL DIMMICK, } Circuit Court of
defendant-appellant. } Winnebago County.

CROW, J.

Robert Hannawell, an individual, brought this proceeding in the Circuit Court of Winnebago County in Quo Warranto seeking to oust the defendant-appellant, Neal Dimmick, from the office of Police Magistrate of the City of South Beloit, Illinois. He first filed with the Clerk an unverified "Petition for Quo Warranto" alleging, among other things, that he is a taxpayer and resident of the City of South Beloit; the Attorney General and the Winnebago County State's Attorney have refused to institute a petition in this matter; the defendant became a candidate for police magistrate; in a preliminary election the defendant received the highest number of votes and in the final election the defendant received the highest number of votes; the petitioner does not complain of the manner of the elections, but that the defendant for other reasons is not a proper candidate; the defendant has qualified with the County Clerk and assumed office; and the defendant has not been a resident of Illinois for more than 5 years and is, by the Constitution, unqualified. The petitioner prayed that the petition be granted, a temporary injunction be issued, and for other relief as equity may require. No

notice to the Attorney General, the State's Attorney, or the adverse party of the intended application for leave to file a complaint in Quo Warranto appears of record. This petition was marked "Filed Sept. 1, 1961 - Paul N. Wilson, Clerk". The petition was evidently docketed by the Clerk, who on the same date, before the filing of any complaint, issued a summons, returnable September 11th, directed to the defendant, Neal Dimmick, to answer the petition, which summons was served by the Sheriff on September 2nd. Next appearing of record is an unverified "Complaint in the Nature of Quo Warranto", filed September 8th, before the return day of the summons, which Complaint followed the general language of the Petition for Quo Warranto, previously referred to, and which prayed that the complaint be granted, the defendant be declared a usurper to the office of Police Magistrate, and the office be declared vacant. On September 22nd, the Court, on motion of the plaintiff, granted leave to the plaintiff to file an amendment to the complaint, which amendment was filed instanter, and which added an additional paragraph 7, as follows: "That the defendant, contrary to Section 3, Article 4, of the Constitution of the State of Illinois, has run for an office created by the State of Illinois while at the same time holding a position of Postmaster of the United States and receiving the sum of more than Three Hundred Dollars (\$300.00) per year for said Post Office position." The defendant filed a "Motion to Dismiss Complaint and Amended Complaint" for the following reasons, so far as now material: (1) The relator has failed to allege sufficient personal interest in order to maintain a Quo Warranto action; (2) CH. 112, ILL. REV. STATS. 1959, Sec. 10, states that a Quo Warranto proceeding may be brought in the name of the People of the State of Illinois " * * * by any citizen having an interest in the question on his own relation * * "; (3) the relator does not have a sufficient interest personal to himself,



but has only an interest which is common to every citizen, and, therefore, the relator does not have enough interest to bring this suit. The Court allowed the motion of the defendant to dismiss the complaint, as amended. Afterwards the Court granted the plaintiff leave to file a supplemental complaint in the nature of Quo Warranto, which was filed instanter. A motion of the defendant to dismiss the supplemental complaint was filed. Thereafter, on motion of the plaintiff, the Court granted the plaintiff leave to make an amendment to the supplemental complaint on its face, which amendment was made instanter. The Court then denied the defendant's motion to dismiss the supplemental complaint as amended. The defendant elected to stand on his motion to dismiss the supplemental complaint, as amended, and the Court, on October 23, 1961, entered an order or judgment of ouster, adjudging Neal Dimmick to be unlawfully holding the office of Police Magistrate. The supplemental complaint, as amended, so far as material, adds to paragraph 1 this allegation: " * * that the plaintiff, Robert Hannawell, is a rival claimant to the office of Police Magistrate of the City of South Beloit, which position the defendant now holds". Otherwise, the supplemental complaint, as amended, was the same as the complaint, as amended, previously referred to, except in paragraph 7 the defendant is alleged to have been a "postal employee of the United States Post Office" instead of "Postmaster of the United States". The defendant's motion to dismiss the supplemental complaint, as amended, is based on the same grounds, so far as material, as his motion to dismiss the original complaint, as amended. The defendant appeals from the judgment of ouster of October 23, 1961 and the denial of his motion to dismiss the supplemental complaint, as amended.

The defendant's theory is that the relator, Robert Hannawell, has only an interest which is common to every other citizen, and,

therefore, does not have sufficient personal interest to bring this action, and that the trial court should have granted the defendant's motion to dismiss the supplemental complaint, as amended.

The plaintiff's theory is that (1) he, Robert Hannewell, has sufficient interest to maintain a Quo Warranto action on his own relation because he is a rival claimant to that office; (2) defendant's objection on the grounds of interest is a point which should have been raised at the hearing on plaintiff's petition for leave to file a complaint in nature of Quo Warranto; and (3) the Court did not abuse its discretion in allowing a complaint to be filed.

The statute relating to Quo Warranto, CH. 112 ILL. REV. STATS., 1959, pars. 9 (in part), 10, 11 (in part), and 15 provide:

"9. WHEN PROCEEDING MAY BE BROUGHT."

A proceeding in Quo Warranto may be brought in case:

(a) Any person shall usurp, intrude into, * * * * " unlawfully hold or execute any office,

"10. WHO MAY BRING PROCEEDING."

The proceeding shall be brought in the name of the People of the State of Illinois by the Attorney General or State's Attorney of the proper county, either of his own accord or at the instance of any individual relator; or by any citizen having an interest in the question on his own relation, when he has requested the Attorney General and State's Attorney to bring the same, and the Attorney General and State's Attorney have refused or failed so to do, and when after notice to the Attorney General and State's Attorney, and to the adverse party, of the intended application, leave has been granted by any court of competent jurisdiction, or any judge thereof."

"11. PARTIES - FORM OF COMPLAINT - JOINDER OF PARTIES - SEPARATE TRIALS."

The People of the State of Illinois shall be deemed the plaintiff and the adverse parties shall be defendants, and the first pleading by the plaintiff shall be designated a complaint. * * * "

"15. CIVIL PRACTICE ACT TO APPLY.

The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modification thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act."

Quo Warranto is the appropriate remedy to determine the eligibility of a public officer: PEOPLE ex rel. ROMANO v. KRANTZ (1958) 13 Ill. (2) 363. But Quo Warranto is a high prerogative writ, and in administering the remedy courts should proceed with due deliberation and caution and the exercise of sound discretion: PEOPLE ex rel. ADAMOWSKI v. WILSON et al. (1960) 20 Ill. (2) 568. It is not a writ of right but lies in the sound discretion of the Court: PEOPLE ex rel. PALMATIER v. TIGHE (1956) 11 Ill. App. (2) 1.

As to who may bring the proceeding, par. 10 of the statute referred to provides, so far as now significant: "The proceeding shall be brought in the name of the People of the State of Illinois * * * or by any citizen having an interest in the question on his own relation * * *. The interest which an individual relator must have in the question to support a Quo Warranto proceeding must be personal and peculiar to him, and not one shared in common by other members of the general public; an interest which an individual has merely as a taxpayer, resident, citizen, or as a member of the general public in the enforcement of the law and its administration only by legally qualified officers is not sufficient: Cf. PEOPLE v. WOOD et al. (1952) 411 Ill. 514; PEOPLE ex rel. MILLER v. FULLENWIDER (1928) 329 Ill. 65; PEOPLE ex rel. PALMATIER v. TIGHE (1956) 11 Ill. App. (2) 1. The relator must have an individual and personal right, distinct from the right, if any, of the public: PEOPLE ex rel. RASTER v. HEALY (1907) 230 Ill. 280. The interest of the in-

dividual must be of such a nature that the alleged usurpation of a public office has trespassed upon or injured his private legal or equitable rights as differentiated from the injury to the general public: PEOPLE ex rel. v. ROSEHILL CEMETERY CO. (1954) 3 Ill. (2) 592. The question to which the individual's interest must attach is the question being litigated, namely, in a case of this type, has the defendant usurped, intruded into, or unlawfully held or executed the office concerned, - the individual must have an interest in the office itself peculiar to him and not common to the public: PEOPLE ex rel. HILLER v. BEVIRT (1938) 297 Ill. App. 335; NEWMAN v. UNITED STATES ex rel. FRIZZELL (1915) 238 U. S. 537, 59 L. Ed. 1446.

The only allegation in the present petition for Quo Warranto and in the original complaint, as amended, as to the interest of the relator Robert Hannawell is that he "is a taxpayer and resident of the City of South Beloit, County of Winnebago, State of Illinois". Clearly, under the cases, that was not a sufficient allegation of facts to indicate he was a "citizen having an interest in the question", within the meaning of paragraph 10 of the applicable statute. The trial court apparently entertained the same view and correctly granted the defendant's motion to dismiss the original complaint, as amended.

The only change made by the supplemental complaint, as amended, in the allegations as to the interest of the relator Robert Hannawell is to add, in addition to the foregoing, the further allegation that he "is a rival claimant to the office of Police Magistrate of the City of South Beloit, which position the defendant now holds".

It has been said in PEOPLE ex rel. MCCARTHY et al. v. FIREK et al. (1955) 5 Ill. (2) 317, though by way of dicta, that, as to

Quo Warranto suits directed to the right of a defendant to hold a public office, p. 324: " * * To prevent officious intermeddling, the right to maintain such actions has generally been restricted to the rival claimant * * ". And in PEOPLE ex rel. ROMANO v. KRANTZ (1958) 13 Ill. (2) 363 it was held, p. 365, that: " * * the interest of the rival claimant is sufficient to maintain the action on his own relation * * ". But in the latter case the determination that the relator there had an interest in the question sufficient to authorize him to maintain Quo Warranto on his own relation was made from a complaint which set forth alleged factual matters as to the relator being an incumbent justice of the peace at the time of the election, that he received the sixth highest number of votes at the election, and that the defendant was one of five successful candidates for justice of the peace at the election. It may not be always altogether clear what is meant by the "rival claimant", but if the interest of the rival claimant is sufficient to say that such a relator is a "citizen having an interest in the question on his own relation", under paragraph 10 of the statute, there is nothing in either of those cases to indicate that, as a matter of pleading, a bare allegation in a complaint that the relator is a rival claimant, - without any other factual allegations in that respect, - is a sufficient pleading. In the case at bar there are no alleged facts set forth in the petition or in the supplemental complaint, as amended, on which to base the assertion that the relator is the "rival claimant". The Civil Practice Act is applicable to a quo warranto proceeding except as otherwise provided in the quo warranto statute: CH. 112 ILL. REV. STATS., 1959, par. 15. One of the substantial averments of fact necessary to state a cause of action here being facts sufficiently indicating that the relator is a "citizen having an interest in the question on his

own relation", this supplemental complaint, as amended, does not, under the circumstances, contain a plain and concise statement of the pleader's cause of action, and such objection to that pleading is required to be raised by motion: CH. 110 ILL. REV. STATS., 1959, pars. 31, 33, 45. A petition for leave to file under the Quo Warranto statute, - and, similarly, a complaint, being the first formally designated pleading, as such, thereunder, (par. 11), - must recite facts, not mere conclusions of the pleader, sufficient to satisfy the Court that there are competent grounds for the proceeding: PEOPLE ex rel. LUTZ v. FRANCE et al. (1924) 314 Ill. 51; PEOPLE ex rel. KOONTZ et al. v. EMMERSON et al. (1924) 313 Ill. 209; PEOPLE ex rel. GREEN et al. v. KIMMEL et al. (1918) 282 Ill. 344. The allegation in this supplemental complaint, as amended, simply that the relator "is a rival claimant to the office of Police Magistrate of the City of South Beloit" is a mere conclusion of the pleader. The defendant's motion to dismiss admits for the purposes thereof only such facts as are well pleaded and not the pleader's conclusions of law or construction of the statute: MCPHAIL v. PEOPLE ex rel. LAMBERT (1895) 160 Ill. 77.

The relator also urges, in substance, that under the Quo Warranto statute any questions as to whether the relator is a "citizen having an interest in the question on his own relation" must be raised at the hearing on the petition for leave to file a complaint, and that the defendant appeared and raised no objection to the relator's filing the complaint. The relator points out no provision of the statute to that effect, and refers us to no Illinois case so holding. Further, the record here is too obscure as to what transpired on the Petition for Quo Warranto, - whether there was a hearing thereon, - whether the defendant objected or not to the filing of the original complaint, etc. - and is not in

such condition as to permit consideration of the argument. And, finally, the allegations of the petition and original complaint, as amended, as to the relator's interest were, as we've said, - clearly insufficient and were so held by the trial court in granting the first motion to dismiss, and the allegations of the supplemental complaint, as amended, in that respect, which are also insufficient, were not even before the Court at the time of the Petition for Quo Warranto, necessarily could not have been then considered, and necessarily did not then require the defendant to state any objections thereto at that time or preclude his presenting the matters now presented in due course by his motion to dismiss the supplemental complaint, as amended.

The judgment of ouster of October 23, 1961 is, accordingly, reversed and the cause remanded with directions to allow the defendant's motion to dismiss the supplemental complaint, as amended, and for further proceedings.

REVERSED AND REMANDED.

Spivey, P. J., and Wright, J., Concur

48474



EDWIN M. KEALEY,

(35 I.A. 261)

Plaintiff-Respondent,

v.

ESTATE OF THOMAS CAREY, et al.,

Defendants-Petitioners.

) APPEAL FROM THE

) TOWN COURT OF

) CICERO, ILLINOIS

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which the jury found defendants not guilty. The trial judge granted plaintiff a new trial and defendants petitioned this court for leave to appeal. We granted leave pursuant to §77(2), ch. 110, Ill. Rev. Stat. (1961). Plaintiff has not filed in this court an appellee's brief in support of the trial court's order granting a new trial.

The record reveals that on Saturday, October 10th, 1959, plaintiff was a patron at the Hawthorne Race Track in Stickney, Illinois, which was owned and operated by defendants. Shortly after 6:00 P.M., following the ninth and last race, plaintiff, according to his testimony, picked his way through the traffic leaving the park so that he could catch a bus in the area provided for that purpose by defendants. While crossing a roadway on defendants' premises he noticed an automobile 15 feet away approaching "real fast" and "bearing down on him." He said he jumped to avoid being hit, and as the car went by him it either brushed or just missed him. In jumping he lost his balance and fell sustaining a fracture of the left ankle.

The jury returned a verdict finding the defendants not guilty. Plaintiff's written motion for a new trial stated:

1. The verdict of the Jury was against the manifest weight of the evidence and contrary to law.
2. Defendant's counsel during the presentation of evidence and cross-examination was guilty of highly prejudicial misconduct.
3. The verdict of the Jury was the result of improper conduct of the attorney for the Defendant.
4. Counsel for Defendant repeatedly asked improper questions and indulged in improper conduct to cause Plaintiff's counsel to object, or to make it appear that Plaintiff's counsel was keeping matters from the Jury or restricting the Defendant to his defense.
5. The verdict of the Jury is the result, clearly of the prejudicial cross-examination, insinuation, and statement of facts either outside the record or stricken from the record by the Court and contrary to the overwhelming weight of the evidence as presented in this cause.
6. Counsel for defendant repeatedly attempted to state or insinuate the existence of facts or circumstances outside the record.
7. Counsel for Defendant during the taking of evidence introduced matters clearly for the purpose of prejudicing the Jury against the Plaintiff, which were completely irrelevant to the issues in the case as evidenced by the Court's striking the matters from the record and instructing the Jury to disregard same.
8. That all of the Defendant's evidence was not only uncorroborated, but specifically denied by the plaintiff, insofar as it related to his condition or sobriety.
9. The verdict of the Jury was based on passion and prejudice and not upon law and evidence.

The trial judge allowed the motion for new trial without specifying the ground for his action. We will consider first whether the trial court could properly have based its action upon the ground that the verdict was contrary to the weight of the evidence. In so doing we are mindful that the trial

court has broad discretionary power to set aside verdicts as being against the preponderance of the evidence. We will not reverse its ruling unless we find a clear abuse of discretion. (Stobbs v. Cumby, 9 Ill. App. 2d 138, 142). As a corollary to this rule, however, the reviewing court cannot disregard questions which fairly challenge the action of the trial court. (Stilfield v. Iowa-Illinois Gas & Electric Co., 25 Ill. App. 2d 478).

The jury in this case responded negatively to a special interrogatory given them by the court asking whether plaintiff was exercising due care for his own safety at the time of the occurrence. Upon reviewing the record we are of the opinion that there was substantial support for this finding. On direct examination plaintiff testified that he had a beer and a sandwich during the day. On cross-examination he admitted having two beers, and in his pre-trial deposition he said he had about three beers that day. He stated further in his pre-trial deposition, "the only reason I fell was that I lost my balance due to the rainy conditions when I jumped to avoid the car."

There were no eyewitnesses to the accident. When James Clabaugh, an ambulance driver employed by Hawthorne, heard that someone was hurt he, together with James Monaco, the safety director, went to plaintiff's aid in an ambulance. The two men testified that plaintiff was incoherent, smelled of liquor, and Monaco said plaintiff was drunk. Monaco further testified that plaintiff was found a considerable distance from the roadway where plaintiff said he fell. The track superintendent corroborated this statement.

Francis Konopenski, a registered nurse, gave plaintiff first aid in the ambulance. She testified that she couldn't understand plaintiff's answers to her questions, and that plaintiff "got mad" and "hollered" at her. In her opinion he was drunk. Dr. Joseph Velek, who was an intern at the McNeal Memorial Hospital in Berwyn where plaintiff was taken on the occurrence date, testified that he took a history of the plaintiff. His recorded charts on plaintiff show that "he was walking in the parking lot at Sportsman Park and was struck on the left leg by an automobile...smells strongly of alcoholic beverage, speech is somewhat slurred and confused."

The complaint contained allegations that defendants negligently maintained the track premises and negligently failed to provide proper and adequate traffic supervision on the premises at the end of the races, which negligence proximately caused plaintiff's injuries. In support of these allegations plaintiff testified that there were auto parking attendants on duty when he first came to the track, but that when he made his way through the parking area after the ninth race they were not around. He said he saw the automobile in question for only a fraction of a second, and failed to see it earlier because "it may have pulled out, it may have pulled out from a parking spot there."



Plaintiff offered four condition witnesses all of whom testified over defendants' objections. One witness was plaintiff's neighbor and another was a law associate of plaintiff's counsel. These witnesses, who had no knowledge of the accident on the occurrence date, testified that they went to the races every Saturday including the Saturday in question, and that the parking attendants customarily do not stay around until after the last race to supervise the automobile traffic.

Safety Director Monaco testified that there were parking attendants on the premises after the last race on the day in question. He said the attendants wait until the automobiles are cleared in order to get tips. Charles C. Miller, the Hawthorne track superintendent, testified that on the day of the occurrence the parking attendants were on duty until the cars left their sections. William C. Collins, the manager of the Hawthorne parking lot, testified that he hires extra men on Saturdays, and on the day in question had about 56 men on duty. He said the men leave their sections when cleared and report to him.

The foregoing review of the evidence shows quite clearly that there was substantial support for the verdict. We thus conclude that it was not within the discretion of the trial court to grant a new trial on this ground. Courts are not free to reweigh the evidence and set aside jury verdicts simply because



judges feel that other results are more reasonable. Stilfield v. Iowa-Illinois Gas and Electric Co., 25 Ill. App. 2d 478, 489.

We find further that the remainder of plaintiff's specifications in the post-trial motion, relating to misconduct of defense counsel and prejudicial circumstances, are totally without foundation in the record. In this regard. there was no opportunity for the exercise of discretion by the trial court.

For the reasons stated, the order of the trial court granting plaintiff a new trial is reversed and remanded for the entry of judgment on the verdict in favor of defendants.

REVERSED AND REMANDED
WITH DIRECTIONS.

MURPHY, P.J., and ENGLISH, J., concur.

Abstract only.



48613

35 I.A. 2106



PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
ex rel. MELBA JOHNSON,)
)
Appellee,) COUNTY COURT,
)
v.)
)
RONALD EARL JOHNSON,) COOK COUNTY.
Appellant.)

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County Court of Cook County, entered in a proceeding under the Uniform Reciprocal Enforcement of Support Act (Ill. Rev. Stat. 1959, Ch. 68, ¶55), ordering the defendant, Ronald Earl Johnson, to pay \$10 per week for support of a minor child until further order.

On May 29, 1959, Melba Johnson, a resident of the State of California, filed a verified complaint for support in the Superior Court of Kern County in that state, alleging, inter alia, that she was married to defendant at Chicago, Illinois, on November 23, 1957; that she is the mother and he the father of a dependent child born September 9, 1958; that she and the child are dependents and are entitled to support from defendant under the provisions of the Reciprocal Enforcement of Support Act of California; and that since February 15, 1958, defendant has refused and neglected to provide her and the dependent child fair and reasonable support according to his means and earning capacity, in that he has provided nothing for their support since that date.



A judge of the Superior Court of Kern County, California, executed a certificate, pursuant to the Act, to the effect that the duly verified complaint of Melba Johnson sets forth sufficient facts from which it may be determined that defendant owes a duty of support to the dependents; that the defendant is believed to reside in Cook County, Illinois; and that in the opinion of the judge the defendant should be compelled to answer the complaint and be dealt with according to law.

Pursuant to statute, authenticated copies of the complaint and judge's certificate were filed in the County Court of Cook County, Illinois, and a summons was issued and served on the defendant.

Defendant filed a sworn answer, admitting the fact and date of the marriage, and that Melba Johnson is receiving assistance from the Welfare Department of Los Angeles County, California. Defendant further answered that he has no knowledge sufficient to form a belief that Melba Johnson is the mother and he the father of a dependent child and denies that she or the alleged dependent child are entitled to support from him under the laws of California or Illinois.

The answer denies that he refused to support his wife and alleges that she wilfully absented herself from him without reasonable cause on February 15, 1958, and has always since persisted in living apart from him. Defendant also alleges that a decree of divorce was entered in his favor on July 21, 1959, on the ground of desertion. Defendant's answer includes a copy of the default decree.



On June 2, 1961, an order was entered in the County Court of Cook County, finding that defendant "is responsible for the support of the minor child," and ordered defendant to "pay the sum of \$10.00 per week as and for support of the minor child herein, effective June 5, 1961, until the further order of this court." The order shows that defendant was not present in court but was represented by counsel, who objected to the entry of the support order.

Appellant contends that the entry of the support order did not comply with the requirements of the Support Act. The pertinent provision of paragraph 55, section 6, is:

"If at such hearing the respondent controverts the petition and enters a verified denial of any of the material allegations thereof, the judge presiding at such hearing shall stay the proceedings and transmit to the judge of the court in the initiating state or initiating county a transcript of the clerk's minutes showing the denials entered by the respondent."

The Uniform Reciprocal Enforcement of Support Act "is designed to enable a dependent in one state to initiate proceedings in the state of his domicile for the purpose of securing money for support from a person residing in another state who is legally liable for the support of such dependent. * * * Rosenberg v. Rosenberg, 152 Me. 161, 125 A.2d 863; Smith v. Smith, 125 Cal. App.2d 154, 270 P.2d 613; Keene v. Toth, 335 Mass. 591, 141 N.E. 2d 509." (Lambrou v. Berna, 148 A.2d 697 (1959).) It is remedial in nature and "is to be construed liberally with reference to the object to be obtained, and every endeavor should be made



by the courts to render the act operable. * * * State of Illinois ex rel. Shannon v. Sterling, 248 Minn. 266, 80 N.W.2d 13; Daly v. Daly, 39 N.J. Super. 117, 120 A.2d 510; Commonwealth ex rel. Shaffer v. Shaffer, 175 Pa. Super. 100, 103 A.2d 430, 42 A.L.R. 2d 761." (Lambrou v. Berna, 148 A.2d 697.) These principles must be followed in considering defendant's contentions.

Defendant argues that his answer denied material allegations of the complaint and, before any order was entered, it was incumbent on the State to substantiate, by proof, the allegations and charges made in the complaint, that "petitioner is a dependent of respondent and that a child was born to her on September 9, 1958," and that the child is still alive. We do not agree.

The presumption of legitimacy, which arose from the fact that the child was born while the parties were wed and within the normal period of gestation after the separation on February 15, 1958, placed upon the defendant the burden of going forward with evidence to make out a *prima facie* rebuttal. The presumption of legitimacy can be overcome only by strong and compelling evidence. In re Petition of Lewis v. LoChirco, 350 Ill. App. 394, 397 (1953).

We believe it was intended by the Act, in providing a hearing, to give a defendant an opportunity to present evidence sufficient to make out a *prima facie* rebuttal of the material allegations of the complaint--in this instance, "strong and



compelling evidence" of the illegitimacy or nonexistence of the alleged dependent child. Defendant chose to present no evidence, did not appear at the "hearing," and elected to stand on his verified answer. This is not enough, because "the purpose of the uniform reciprocal enforcement of support act is to obtain support for dependents, and not to provide a procedural field day for defaulting husbands and fathers." Kirby v. Kirby, 155 N.E.2d 165, 169 (1959).

We conclude that the record in this case supports the order and judgment of the County Court, and it is hereby affirmed.

AFFIRMED.

BURMAN and ENGLISH, JJ., concur.

Abstract only.



Abstract

General No. 11595

Agenda No. 11

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION

February Term, 1962

1st DIVISION

PAUL LUKANICH, } (35 I.A.2 140)
Plaintiff-Appellee, }
vs. } Appeal from the
JOLIET YELLOW CAB COMPANY OF } Circuit Court of
JOLIET, ILLINOIS, an Illinois } Will County.
Corporation and RALPH A. GASPER, }
Defendants-Appellants. }

DOVE, P.J.

This was an action brought by Paul Lukanich to recover damages for personal injuries received by him while riding as a passenger in a cab belonging to Joliet Yellow Cab Company of Joliet. The cab, upon the occasion in question, March 3, 1958, was being driven by Ralph A. Gasper in a northerly direction on Chicago Street in Joliet. At the same time Laverne Bersano was proceeding in a southerly direction in his automobile on the same street and intended to make a left turn into Fifth Avenue. At the intersection of Chicago Street and Fifth Avenue the cab and car collided and plaintiff received the injuries, to recover for which, he brought this action.

The defendants Yellow Cab Company, Ralph A. Gasper and Laverne Bersano answered and the issues made by the pleadings were submitted to the jury resulting in a verdict in favor of the plaintiff and against the Yellow



Cab Company and Ralph A. Gasper for \$7500.00. A verdict of not guilty was returned as to defendant Bersano. Judgments were rendered on ^{these} verdicts and, after denying the post-trial motion of the Cab Company and Gasper, these defendants appeal.

The record discloses that at the time of the accident plaintiff was 55 years of age and had been, since 1941 or 1942 engaged as a structural iron worker which required heavy lifting. Since May 22, 1959 and at the time of the trial, plaintiff was a deputy sheriff of Will County. On March 3, 1958 he was putting out literature for the sheriff and arrived at Spesio's Tavern about 3:00 or 3:30 o'clock in the afternoon of that day. About 4:30 p.m. he called a cab and left the tavern in the cab. The cab had proceeded a short distance ~~and~~ when the accident occurred.

Plaintiff testified that he was lighting a cigarette at the time of the impact; that as a result of the collision he was "knocked out"; that his glasses were broken and he did not know whether his head struck anything or not; that his first recollection, after the collision, was after he had been placed in the ambulance on his way to St. Joseph's Hospital; that he was carried into the emergency room from the ambulance and went to the x-ray room in a wheel chair; that his back, chest, head and hip bothered him and he had ringing in his ears and a headache.

As abstracted, plaintiff continued: "I didn't stay in the hospital; they did not have a room available and they wanted to put me in the hall and I thought I'd be better back home and I went to bed; the following day I was too sore to leave the house and had hot pads applied, the following day was Wednesday, the doctor wasn't in so I went to him on Thursday. When he examined



mo I noticed I was sore all over. I still had headaches and had pain and discomfort. He (Dr. Zalar) applied heat to my back and chest and prescribed some pills. I'm pretty sure I saw him more than 20 times all together. I was off work from March 3rd to April 22nd. I don't recall how much longer I was off. Dr. Zalar gave me hot treatments and checked me during the time I went to him. All I used at home was a hot pad. The nurse gave me the treatments. On April 22nd, I didn't feel so good, still had headaches and pain in the neck and back and a hum in the ears. In December 1958 my neck and back still hurt. I had pain. I still have difficulty moving or turning my head and the sensation of ringing in the ears. I would say I was off work about 3 months, maybe less. I wouldn't say for sure. Since the accident I haven't done any climbing. At present I don't feel so good. I get pains in the back of the neck, headaches, hum in the ears, flashes, pains in the back and leg. I take anacin for it. I still use a bed board. I still have pain in the neck. Prior to this I had headaches very seldom and never felt soreness in my hand or shoulder".

Dr. Joseph Zalar testified that plaintiff was one of his early patients; that he had attended him in 1953 and on March 6, 1958, plaintiff came to his office, told him he had been in an automobile accident and Dr. Zalar's examination disclosed considerable tenderness over the anterior and posterior part of his chest and over the right ilium; that plaintiff's movements were jerky and caused him considerable pain; that in attempting to rise from a seated position he had considerable difficulty straightening up and had difficulty in bending over because of pain in his back.

The Doctor further testified that he found a slight contusion over the right hip and tenderness was elicited on pressure; that plaintiff was unable to rotate his neck; that when he tried to turn his head, the neck would remain fixed and he would rotate his body; that there was tenderness



on the left side of the neck and about the fourth, fifth and ninth ribs; that plaintiff complained of dizziness and pain ⁱⁿ his right shoulder; that the x-rays of plaintiff's cervical spine and lumbar spine evidenced osteo-arthritis but those x-rays and the x-ray of his ribs evidenced no fracture; that a blow to the back of the neck can aggravate osteo-arthritis and cause pain; that he prescribed a bed board and diathermy treatments; that he discharged plaintiff the latter part of April, 1958 at which time he was considerably improved but was not able to fully rotate his head and there was a slight tenderness in the neck, and in the right hip and in the left cervical areas; that in February, 1959 he referred the plaintiff to Dr. McCoy because of the persistent tenderness in the neck and dizzy spells; that Dr. McCoy reported that the dizzy spells may have been the result of a post-concussion syndrome and the neck pain due to whiplash injury which may persist for several months.

Doctor Zalar further testified that prior to this accident plaintiff was in good physical condition; that he didn't recall any special treatment to his neck during 1959 but believed he saw him in 1960 and that everytime he came to the doctor's office he would refer to his back bothering him; that he was unable to completely rotate his neck; that this condition was both subjective and objective in the sense that, in placing your hands on the patient you can determine how far the neck will rotate. It was the doctor's opinion that this condition could be permanent and that plaintiff's complaints were due to the injury plaintiff sustained in the accident on March 3, 1958.

The record in this case consists of 372 pages and discloses that defendants, Bersano and Gasper were called by the plaintiff and cross-examined as adverse witnesses under the provisions of the Practice Act. The testimony of Bersano covers 23 pages of the report of trial proceedings and the testimony of Gasper covers 18 pages of the record. Their testimony is not abstracted. Dr. Zalar testified on behalf of the plaintiff and the



plaintiff testified in his own behalf. The only evidence offered on behalf of the defendants was a receipted repair bill, showing the repairs made to the taxicab involved in this collision and the cost thereof which was \$226.19.

The contention of appellants is that the verdict is contrary to the weight of the evidence; that the damages are the result of passion and prejudice, based on speculation and conjecture on the part of the jury, and are clearly excessive.

Appellants contention is directed entirely to the amount of the verdict and in concluding their argument, counsel, say:

"Here it is obvious that plaintiff, by his own contradictory and inconsistent testimony and the contradiction elicited from his medical witness, has failed to prove that the damages alleged are reasonably certain. To arrive at their verdict the jury must needs have disregarded the manifest weight of the evidence and resorted to speculation and conjecture to give plaintiff the \$7500.00 award as damages. The sum is far from just compensation for injuries sustained and so exceeds even a rough correspondence to the elements of damages, as proved, as to impel the conclusion that the jury was improperly motivated. That a jury should have some degree of prejudice against a corporate taxi cab defendant is not unexpected, nonetheless, when manifested in an excessive verdict, it should not be allowed to stand under the convenient shelter that the verdict is not so large as to shock the judicial conscience. Indeed when the entire case is so presented as to allow the jurors to speculate as to the nature and extent of the damages with the apparent hope, (fulfilled by the verdict) that the prejudice of the jurors against the defendants would lead them to disregard the manifest weight of the evidence and return an award commensurate with this prejudice, it should be a signal for the court to examine its conscience on the question whether substantial justice has been done".

Counsel recognize that the rule is well settled that the amount of an award in a case of this character rests largely within the sound discretion of the jury. Counsel argue however, that the fundamental principle upon which damages are based is just compensation for the injury sustained and insist that the verdict in this case is obviously for a larger sum than that called for by the evidence.



As a result of this collision, plaintiff did not work for about three months thereafter; that his ability to work at his accustomed employment as a structural iron worker became impaired. He had x-rays taken which indicated he had no fractures. He was under the care and treatment of his family physician and his medical expenses amounted to \$264.00. His testimony as to the pain he suffered was corroborated in part by the testimony of his physician. The record, discloses that his earnings for the year 1956 were \$7,058.46 for the year 1957, \$7356.03, for the year 1958, \$4,712.92 and for the year 1959, \$3235.06. For the year of the accident, 1958 his earnings diminished \$2643.11 from what they had been the previous year and in 1959 diminished \$4120.97 from what they had been in 1957.

The pain plaintiff suffered is not susceptible of mathematical calculation but is an element of damage to be taken into consideration by the jury and his testimony as to the pain and discomfort he suffered is substantiated by his attending physician who testified that plaintiff's inability to fully rotate his neck, existed and in his opinion could be permanent.

No complaint is made by counsel with reference to the conduct of opposing counsel during the trial of this case or in the presentation of their arguments to the jury or to any erroneous rulings of the court in the admission of the evidence or of the instructions of the court to the jury as to the law applicable to the issues presented to the jury for its consideration. It does not appear to this court that the verdict of the jury was improperly motivated or the result of passion or prejudice. Because reasonable men might differ on the question of the amount of damages a plaintiff is entitled to recover does not warrant the conclusion that the jury was moved by passion. (Smith vs. Illinois Central R.R. Co. 343 Ill. App. 593, 612).

The law in Illinois is that the amount of a verdict is largely within the discretion of the jury. A verdict may be large in comparison to the expenses of the plaintiff but we cannot limit compensable damages for pain and suffering to a percentage of medical hospital and kindred expenses. "Each verdict for a personal injury", continues the court, (p. 453) in Lau vs. West Towns Bus Company, 16 Ill. 2d 442, "must be examined in the light of the particular injury involved, with humble deference to the discretion of the jury in making its determination and to the ruling of the trial judge on post-trial motions".

The judgment of the Circuit Court of Will County is affirmed.

Judgment affirmed.

McNEAL, J. CONCURS.

SMITH, J. CONCURS.

STATE OF ILLINOIS

APPELLATE COURT

35 I.A. 2 164

THIRD

AT AN APPELLATE COURT, for the ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 16th day
of MAY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

FILED

161

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Robert L. Conn, CLERK
APPELLATE COURT 3rd DIST.

General No. 10375

Agenda No. 10

Helen Bond, Marie Bond, Imogene Browning,)
Catherine Frailey, Josephine Glenn,)
Caroline Hass, Maye Hungate, Bernadine)
Karcher, Lillian Kaufman, Blanch McDonald,)
Geneviva Sneed, Opal Thompson and Viola)
Wheeler,)
Plaintiffs-Appellants,)
vs.)
Decatur Garment Company, a corporation,)
Virginia Shuster and Nell Webb,)
Defendants-Appellees.)

Appeal from the
Circuit Court of
Macon County.

ROETH, Presiding Justice.

This case arises on the pleadings. Plaintiffs filed an amended complaint against defendants consisting of 26 counts. Each plaintiff is plaintiff in two separate counts against defendants and the odd numbered counts are identical except that they refer to a different plaintiff and the even numbered counts are identical except that they refer to a different plaintiff. Thus in counts 1 and 2 Helen Bond is plaintiff. In counts 3 and 4 Marie Bond is plaintiff and in corresponding order as to each plaintiff named in the caption of the case through all 13 plaintiffs. Defendants filed motions to strike and dismiss which were sustained and plaintiffs having

elected to stand on their amended complaint, judgment was entered against them. This appeal followed.

The odd numbered counts allege in substance that plaintiffs and the individual defendants were employed by the defendant Decatur Garment Co. and that the individual defendants and others combined together in securing the discharge of plaintiff by refusing to work with them and that Decatur Garment Co. acceded to the demands of the individual defendants by discharging plaintiffs. It is claimed that this action was unlawful and a violation of plaintiffs' right to work and obtain a livelihood.

The even numbered counts proceed upon the theory that the refusal to work with plaintiffs constituted a blacklisting or boycotting of plaintiffs contrary to Sec. 139 of the Criminal Code and therefore gives rise to a civil action for damages.

At the outset it is to be noted that certain affidavits were filed in this cause in the trial court. They appear in the record before us and the parties have treated these affidavits as properly filed and as supplementing the amended complaint and motion to dismiss. Likewise it should be noted that although the amended complaint may be said to allege a threat of violence and riot against the employer unless plaintiffs were discharged, it now appears from the briefs and oral arguments that plaintiffs have

abandoned any attempt to bottom the sufficiency of the amended complaint upon such allegations. It is conceded by all parties that plaintiffs' employment was for an indefinite term and terminable at will.

The crux of the problem lies in an instrument appearing in the record which recites:

"We, the employees of the Decatur Garment Company, refuse to work with the ones who have refused to pay the rent which they voluntarily agreed to pay to the Chamber of Commerce."

This instrument is signed by some 45 persons. It was presented to Decatur Garment Co. and the discharge of plaintiffs followed.

In the case of Kemp v. Division No. 241, A. Assn, Street and E. Ry. Employees, 255 Ill. 213, 99 N.E. 389, the question here involved was analyzed by the Supreme Court. There a group of employees of the Chicago Railways Company had belonged to a union but had withdrawn from membership in the union. The union membership then took a vote, which carried in the affirmative, on the question: "Shall we cease to work with men who after receiving benefits through our organization refuse to continue members". Demand was then made upon the Chicago Railways Company to discharge the plaintiffs who had withdrawn their membership in the union. The Chicago Railways Company was also notified that unless plaintiffs were discharged the union employees would cease work. The

16374

suit in question was for an injunction to prevent the union employees from ceasing to work.

The Supreme Court in analyzing the right of plaintiffs to sustain their complaint approached the question from the standpoint of the right of the employees as individuals to insist upon a discharge of their co-employees or to refuse to work if they were not discharged. Thus, while no union is involved in the case at bar, the language of the Supreme Court in its analysis is decisive of the question here involved. The Supreme Court said:

"The mere fact that one person sustains damage by reason of some act of another is not, however, sufficient to render the latter liable to an action by the former for such damage, but it must further appear that the act which occasioned the damage was a wrongful act and not one performed in the exercise of a legal right, otherwise it is *damnum absque injuria*. ***

"Every employe has a right to protection in his employment from the wrongful and malicious interference of another resulting in damage to the employe; but, if such interference is but the consequence of the exercise of some legal right by another, it is not wrongful, and cannot, therefore, be made the basis for an action to recover the consequent damages. It is the right of every workman, for any reason which may seem sufficient to him, or for no reason, to quit the service of another, unless bound by contract. This right cannot be abridged or taken away by any act of the Legislature, nor is it subject to any control by the courts; it being guaranteed to every person under the jurisdiction of our government by the thirteenth amendment to the federal Constitution, which declares that involuntary servitude, except as a punishment for

crime, shall not exist within the United States or any place subject to their jurisdiction. Incident to this constitutional right is the right of every workman to refuse to work with any coemployee who is for any reason objectionable to him, provided his refusal does not violate his contract with his employer; and there is no more foundation for the contention that the employe commits an actionable wrong by informing the employer, before he leaves the service, that he will not work with the objectionable coemployee, and thereby occasioning his discharge, than there would be for the contention that the employe would commit an actionable wrong by quitting the service and afterward stating to the employer his reason therefor, if as a result thereof the employer should choose to discharge the objectionable coemployee. In either case the employe is exercising a legal right, and although it results in damage to the objectionable coemployee the latter has no cause of action against the former for causing his discharge. In the case at bar, had the union employes, as individuals and without any prearranged concert of action, each informed the Railways Company that they would no longer work with appellees because appellees were not members of the union, and had appellees, in consequence thereof, been discharged because the Railways Company chose to retain the services of the union employes, appellees would have had no cause of action against the union employes for thus causing their discharge."

In the case at bar there was no duty on the individual defendants, by contract or otherwise, resting on them to continue to work, nor any duty, by contract or otherwise, resting on the defendant Decatur Garment Co. to continue plaintiffs in its service. The right to control his own labor and to bestow or withhold it where he will, belongs to every man. It would be an anomalous doctrine to hold, that after his fellow workmen have concluded he was not

a desirable co-employee, they must continue to work with him, under penalty of paying damages if, by their refusal to work with him, the work was for a time stopped or the co-employee was discharged.

Counsel for plaintiffs rely upon language in Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924; Wilson v. Hey, 232 Ill. 389, 83 N.E. 928; Purington v. Hinchliff, 219 Ill. 159, 76 N.E. 47; London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 69 N.E. 526, to the effect that every man has a right, between himself and others, to freely dispose of his own labor according to his will and anyone who invades this right by securing his discharge from his employment commits a legal wrong, as sustaining their contentions. These cases are all relating to a discharge secured by an unlawful act. The first three cases are boycott cases and boycotts of the type there involved have been repeatedly held to be unlawful in Illinois. The last cited case involved a situation where a discharge was accomplished by the unlawful act of threatening to cancel a contract which the person making the threat had no right to cancel at the time. Other cases cited by counsel for plaintiffs can be likewise distinguished from the Kemp case. We therefore conclude that the odd numbered counts in the amended complaint were insufficient to state a cause of action

and that the motions of defendants were properly sustained.

We now consider the even numbered counts as to which it is contended that the same acts alleged in the odd numbered counts constitute a black listing or boycott of plaintiffs giving rise to a civil action for damages. A "blacklist" is a list of individuals marked out for censure or discrimination on the part of those who prepare the list or those among whom it is intended to circulate.

Websters New International Dictionary, 2nd ed; Blacks Law Dictionary, 4th ed; 11 Corpus Juris Secundum page 354. Specifically in labor relations, it usually refers to an employer's list of workers or prospective workers marked out for censure or discrimination because of their union sympathies or activities. In labor relations, the word "blacklist" has also on occasion been used to refer to a list of employers regarded as unfair to workmen, although it has been customary to refer to such lists as "unfair lists" while reserving the term "blacklist" to connote an employer's list of workers. See Illinois Labor Law by Barnet Hodes, page 16.

Boycotts are of two types, either primary or secondary. The former has been defined as a combination of two or more people by concerted action to cease dealing with a person with whom the combination has a dispute. 15 Corpus Juris Secundum, page 1013. A secondary boycott is a combination to exercise coercive pressure

upon customers, actual or prospective, in order to cause them to withhold their patronage through fear of loss or damage to themselves. 2063 Lawrence Ave. Bldg. Corp. v. Van Heck, 377 Ill. 37, 35 N.E. 2d 373.

Under the foregoing definitions we fail to see how the signing of the instrument, which we have heretofore referred to, constituted a blacklist of plaintiffs or a boycott. If as we have heretofore noted the individual defendants had the right to refuse to work with plaintiffs, the mere signing of a statement to that effect would not in our opinion constitute a blacklist or boycott within the contemplation of Sec. 139 of the Criminal Code. The motions of defendants to dismiss the even numbered counts of the amended complaint were, therefore, likewise properly sustained.

Accordingly the judgment of the Circuit Court of Macon County will be affirmed.

Affirmed.

Justice Reynolds and Justice Carroll concur.

STATE OF ILLINOIS

APPELLATE COURT

(35 I.A. 2 174)

THIRD
AT AN APPELLATE COURT, for the ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 16th day
of MAY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10382

Agenda No. 5

Francis L. Knott and Mary R. Knott)	
)	
Plaintiffs-Appellants)	
	)	Appeal from the
vs.	)	Circuit Court of
Freuhauf Trailer Co., a corporation,	)	Tazewell County
and Floyd W. Phillips)	
)	
Defendants-Appellees.)	

CARRODD, J.

Plaintiffs appeal from a judgment entered on a not guilty verdict in an action for personal injuries and property damage arising out of a collision between a passenger automobile driven by plaintiff, Mary R. Knott, and a truck owned by defendant, Freuhauf Trailer Co., and operated by defendant, Floyd W. Phillips. To avoid confusion, the parties will be referred to herein as plaintiff and defendant.

Plaintiff's contentions are that the verdict is contrary to the manifest weight of the evidence; that the trial court erred in admitting in evidence certain photographs offered by defendant, in refusing to give plaintiff's tendered Instruction No. 8 and in denying plaintiff's motion for a continuance.

The collision occurred during the daylight hours of November 20, 1958, on U. S. Route 24, when plaintiff attempted to pass defendant's truck as it was making a left turn into the driveway entrance of the Freuhauf Trailer Co., in the City of East Peoria, Illinois. The weather was clear and the pavement dry. Mary R. Knott testified that at the time of the accident she was returning to her home; that she first saw the Freuhauf truck when she came up behind it as she entered Route 24 from Route 150; that she followed the truck east on Route 24 for a mile more or less prior to the collision; that she was driving between 20 and 25 miles per hour; that the truck was a semi with a flat trailer; that she had driven along Route 24 in that area many times prior to the collision; that she was familiar with the location of the Freuhauf Trailer Co. and its entrance; that her automobile was in good operating condition and the brakes worked; that her windshield was clear and she could see the trailer and the tractor; that she saw nothing on the flat bed of the trailer and that the cab was higher than the trailer bed; that as she followed the truck she could see the top part of the cab; that there were no cars between her vehicle and the truck; that immediately before the collision she started to pass the truck; that her attention was then directed toward the west bound traffic lane to determine whether there were cars coming from the opposite direction; that she did not remember whether or not she sounded her

horn before attempting to pass; that when she started around the truck it made a left turn and struck her car; that she did not see any signal lights operating on the truck just prior to the collision nor did she see any arm signals given by the driver.

Floyd W. Phillips testified that when the accident occurred he was driving a tractor which was attached to a tandem trailer; that there were no lights including turn signal lights, parking lights or stop lights operating on the rear of the trailer which he was driving; that the failure to have these lights operating on the trailer was due to the fact that the plug connecting the same to the tractor did not fit; that there were stop lights and signal lights on the tractor; that as he approached the Freuhauf driveway he looked in the rear view mirror and saw 3 or 4 cars behind him; that at that time he did not know which one of these cars was that of the plaintiff; that he indicated his intention to make a left hand turn into the driveway by putting on the left turn signal on the tractor and extending his arm out of the window; that he saw the tractor turn signal was flashing; that when he gave these signals he was about 100 yards from the driveway; that he kept his arm extended until he was turning into the driveway; that before making his turn he again looked in the rear view mirror; that he also observed that no cars were approaching in the opposite or left lane; that he then proceeded to turn and when about 2/3 of the tractor and trailer were off the highway the collision occurred; that plaintiff's car struck his

vehicle in front of the left front wheels of the trailer; that he did not specifically see plaintiff's car at any time prior to the collision; that he applied his brakes as he heard the squealing of plaintiff's brakes; that his truck was then going into the Freuhauf driveway and that he was driving between 10 and 15 miles per hour when he heard the squealing of plaintiff's brakes. This witness further testified that the length of the tractor and trailer was about 45 feet; that the trailer was a flat bed with no sides and contained no cargo except some pieces of flat iron that were not over 1/2 inch thick and that the bottom of the cab window on the driver's side was about 1 foot higher than the trailer bed.

James R. Ary, a witness for defendant, testified that at the time of the accident he was driving east on highway 24; that he observed in front of him the defendant's truck followed by 2 cars; that he saw the truck driver give a signal to turn by extending his left arm straight out the window; that this hand signal was made before plaintiff had begun to pass the truck; that he first noticed the hand signal when the truck was east of the entrance to a cemetery which was about 300 feet from the Freuhauf driveway; that before turning the truck slowed down from 30 to 2 or 3 miles per hour; that there was nothing on the bed of the trailer to obstruct his vision of the cab and the driver's arm; that the right front fender of plaintiff's car came in contact with the left rear wheels of the trailer; that at the time of the collision approximately 2/3 of the tractor and trailer was off the highway and in the Freuhauf driveway and that plaintiff's car was in the left hand traffic lane.



Plaintiff argues in effect that the verdict must be held to be contrary to the manifest weight of the evidence because the evidence shows that defendant operated a truck and trailer which was at least 45 feet in length with knowledge that the rear lights on the trailer were not working and fails to show any negligence on plaintiff's part.

The burden of proving due care on the part of Mary R. Knott, the negligence of the defendant and that such negligence was the proximate cause of the collision and resulting injuries rested upon the plaintiff. An examination of the record emphatically demonstrates that the evidence bearing on these essential elements of plaintiff's case was in conflict. Phillips testified that he indicated his intention to turn into the Freuhauf driveway by putting on the turn signal on the tractor and by signalling with his arm; and the contact between the 2 vehicles was made after the truck had entered the driveway. His testimony with respect to the giving of an arm signal was corroborated by the witness Ary. Plaintiff's explanation of how the accident occurred was that she looked for brake lights and signal lights on the truck; that she observed no turn signals and proceeded to pass and that the truck turned into her car. With these conflicting versions of the occurrence in the record plus other facts and circumstances shown by the evidence, it was for the jury to determine whether as alleged in the complaint plaintiff was at the time in question in the exercise of



due care for her safety. Plaintiff asserts that the absence of rear turn signals in working order on the trailer rendered the defendant guilty of negligence. Such facts was not conclusive on the issue of negligence any more than was plaintiff's statement that without warning defendant's vehicle turned into her car. The jury was not required to accept plaintiff's version of the collision and its failure to do so affords no basis for holding the verdict to be contrary to the manifest weight of the evidence. As this court has stated on numerous occasions, it is only where a conclusion opposite to that reached by the jury is clearly evident that a verdict can be said to be contrary to the manifest weight of the evidence. Such is not the situation existing in this case. Stone v. Guthrie, 14 Ill. App. 2d 137; Parrucci v. Kruse, 12 Ill. App. 2d 30.

During the trial defendant offered in evidence certain photographs of a Freuhauf tractor and trailer. These are identified in the record as defendant's Exhibits 1, 4, 6 and 8 and portray the appearance of such a unit from different viewpoints. The witness Phillips testified that these exhibits were photographs of a Freuhauf tractor and trailer and accurately and correctly represent the tractor and trailer he was driving at the time of the collision. The witness further stated that he could not say whether or not the truck appearing in the pictures was the particular unit he was driving at that time. Plaintiff objected to the photographs on the ground that they were not identified as correctly and accurately



portraying the particular truck driven by Phillips. The trial court overruled the objection and its action is assigned as error.

It is a well established rule that photographs which illustrate the subject matter of testimony may be received into evidence for the purpose of assisting the jury in applying the testimony more intelligently to the facts shown. Dept. of Public Works v. Chicago Title and Trust Co., 403 Ill. 41. Defendant's proof established that the exhibits were pictures of a tractor-trailer unit of the same make as that involved in the occurrence; and that they were accurate representations of the unit driven by Phillips on the day of the collision. Thus it was made plain to the jury that the exhibits were not photographs of the particular tractor-trailer of defendant which Phillips was driving. We have examined these exhibits and we think when considered in connection with other evidence in the case that their admission was not prejudiced to plaintiff but would be of assistance to the jury in determining the facts. The trial court did not abuse its discretion in submitting them to the jury. Smith v. Eichelberger 175 Ill. App. 231.

Plaintiff contends the court erred in refusing to grant plaintiff a continuance to permit calling of an additional witness. Apparently in an effort to establish the distance from the center of the steering post to the outer left edge of the truck, plaintiff called 2 of defendant's witnesses adversely. When it developed that neither of those witnesses could furnish such information, counsel for plaintiff moved for a continuance to allow him sufficient time



to call a direct witness to testify as to the distance in question. The practice on a motion for continuance on account of the absence of material evidence is prescribed by Supreme Court Rule 14 which requires that such motion be supported by affidavit showing that due diligence has been used to obtain the evidence. Here no attempt was made to conform to such rule and the record is barren of any explanation of plaintiff's failure to discover the information sought in advance of trial. Plaintiff's motion was properly denied.

Remaining for consideration is the question whether the trial court erred in refusing to give plaintiff's tendered Instruction No. 8. This instruction recited that at the time of the collision there were statutes which required a person turning a vehicle from a direct course upon a highway to give an appropriate signal; that the statutes further state in part: "That when the distance from the center of the top of the steering post to the left outside limit of the body, cab or load of a motor vehicle exceeds 14 feet, such motor vehicle shall be equipped with, and the required signal shall be given by, a signal lamp or lamps or mechanical signal device. The latter measurement shall apply to any single vehicle, also to any combination of vehicles." The instruction concluded with this statement: "You are further instructed that you may take these statutes into consideration together with all the other evidence in the case in arriving at your verdict."



The record of the conference on instructions indicates that the basis of the trial court's ruling was the failure of the instruction to point out to the jury the manner in which the statutory provisions cited were applicable to this particular case. As tendered the instruction constituted no more than an abstract proposition of law. It merely stated that the jury might take certain statutes into consideration in reaching a verdict. Thus the jury might well assume that a violation of such statutes was conclusive on all issues in the case including not only the negligence of the plaintiff but likewise that of contributory negligence and of proximate cause. The instruction should have been qualified so as to permit the jury to consider the statutory violations together with all the other facts and circumstances in evidence in determining whether plaintiff was negligent before and at the time of the accident. If given it would have a tendency to mislead the jury. As the court said in Mayer v. Springer, 192 Ill. 270: "It is the duty of the Court to give to the jury, in its instructions, rules of law which are applicable to the evidence in the case, and to make the application so that the jury may understand the relation of the rules to the evidence." Plaintiff's Instruction No. 8 was properly refused.

We find no reversible error in this record and the judgment of the Circuit Court will be affirmed.

Affirmed.

BOETH, P. J. and REYNOLDS, J., concur.



STATE OF ILLINOIS

APPELLATE COURT

THIRD

AT AN APPELLATE COURT, for the ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 16th day
of MAY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

FILED

14-16-1952

Robert L. Conn, CLERK
~~APPELLATE COURT 3rd DIST.~~

General No. 10386

Agenda No. 7

Orville Little,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
-vs-	)	Coles County
)	
Ivan Price,)	
)	
Defendant-Appellant.)	

ROETH, Presiding Justice.

This action was brought for injuries sustained by plaintiff when his automobile ran into a truck owned by the defendant, which truck was parked on the shoulder of a highway on which plaintiff was traveling. Trial by jury resulted in a verdict for the plaintiff on which the lower court entered judgment. This appeal is from that judgment and the lower court's denial of defendant's motion for directed verdict at the close of plaintiff's case, at the close of defendant's case, and for judgment notwithstanding the verdict, or in the alternative for a new trial. It is conceded that the only question involved in the appeal is whether from the evidence plaintiff was in fact guilty of contributory negligence as a matter of law, defendant contending

that the record is devoid of evidence establishing plaintiff's due care. Defendant concedes that in determining the question before this court we can only consider the uncontradicted evidence, the evidence favorable to plaintiff and all reasonable inferences to be drawn therefrom, in determining the negligence or lack of negligence of the plaintiff. Budds v. Keeshin Motor Express Co., Inc., 326 Ill. App. 59, 61 N.E. 2d 579; Bell v. McMullen, 327 Ill. App. 12, 63 N.E. 2d 523, and Wohlwend v. Fosse, 345 Ill. App. 434, 103 N.E. 2d 669.

Bearing this well known principle in mind, the facts are as follows. Defendant is, and was at the time of the incident herein, the owner of a fleet of trucks used to spread fertilizer on farms and on the day in question had two trucks working in a field near the Village of Lerna, Coles County, Illinois. One truck was operated by James Morgan and the other by Robert Janneaux, both employees of the defendant. The field being worked at the particular time was about one quarter mile from the village limits of Lerna. The collision occurred on a public highway known as the Lerna Road, which road at that point was straight and flat, running in an east-west direction. The field worked by the defendant's employees lay to the south of the road. Morgan and Janneaux were spreading rock phosphate, the substance having been placed into the V-shaped

bed of the truck at the plant of the defendant, the truck driven to the field to be worked and spread into the field by means of a conveyor belt that carried the substance to the back of the truck and scattered it onto the ground through a chute-like apparatus on each side of the rear end of the truck. The fertilizer was a dry, powdery substance and when deposited on the ground created a certain amount of fine dust, a portion of which was carried by the wind. Janneaux was the first to leave the plant and arrive at the field to be worked, with Morgan arriving a short time thereafter. Morgan worked the field by driving the truck from north to south and south to north, depositing the fertilizer as he drove. Janneaux finished his work, drove to the exit of the farm and onto the Lerna Road and proceeded down the road in a westerly direction. When he arrived at the point in the road adjacent to the place Morgan was working he pulled the truck off the road on the north shoulder and parked it. It appears from the evidence that the left rear wheel of the truck was at least partially on the highway. Janneaux got out of the truck, crossed the road and walked to the fence on the South side of the road, there intending to wait for Morgan and have a few words with him. At that time Morgan was spreading fertilizer and driving in a northerly direction and was about 300 feet south of the road. At that very

moment plaintiff struck the rear end of the parked truck that Janneaux had been driving. Plaintiff had been home in Lerna and was driving to a friend's home to attend to private business. The collision occurred on April 23, 1959, during daylight, at approximately 5:40 P.M. The weather was clear and there was a moderate to strong wind blowing in a northwesterly direction, estimated by at least one witness at approximately 15 to 20 miles an hour. There is no dispute that when defendant's employee spread the fertilizer some of the powdery white dust was carried by the wind across the highway. The density of the dust is a matter of dispute and the testimony is conflicting. Morgan and Janneaux testified that it did not obscure vision at the road and stated that they were able to see utility poles located on the right of way near the place where the collision occurred. Plaintiff testified that as he left Lerna and approached the place of the accident the dust completely obscured his vision. He described it by saying it "looked just like a big cloud, looked like trying to see through a wall". He was traveling at a rate of 35 miles an hour and as he entered the dust he let up on the accelerator and pulled to the right side of the road. This is his last recollection until he regained consciousness momentarily, immediately after the collision. He testified that up to that point he did not leave

the road and this is substantiated by the physical evidence of skid marks and testimony of the witnesses who came upon the scene immediately thereafter. That testimony showed that the automobile was still on the paved portion of the highway, no part of it being on the shoulder.

We feel there is sufficient evidence from which we must conclude that plaintiff's vehicle at no time left the paved portion of the road and at the same time must conclude that defendant's truck was parked so that at least the outside left rear dual wheel was on the paved portion of the road. Defendant all but concedes this to be true. He contends, however, that (1) plaintiff either failed to use due care as a matter of law when he drove into the area where the dust so obscured his vision as to make it impossible for him to stop in time to avoid the collision, or (2) was guilty of contributory negligence as a matter of law in failing to see the defendant's truck, the area not being so obscured by the dust as to prevent him from seeing same had he looked. It should be noted that the speed limit at the place where the accident occurred was 65 miles an hour, that it was not near an intersection or in an area where one might reasonably expect parked vehicles or a lot of traffic.

As previously noted, Morgan and Janneaux testified that the dust did not greatly impair vision, if it did so at all. A

witness for plaintiff who had driven East through the area approximately 25 minutes earlier testified that visibility was from 20 to 25 feet. Except for plaintiff, however, there was no testimony as to the density of the dust cloud just immediately prior to the collision. Janneaux did not see plaintiff's car until he heard the collision and turned in time to see plaintiff falling from the car. Morgan, working toward the road and the place of the collision, testified only to seeing the impact and plaintiff fall from the car. He was not asked and it is apparent that he did not see plaintiff except at the very instant of the impact. A witness for plaintiff testified that he was about one quarter mile away from the accident, heard the impact and looked up and could see the vehicles involved. He testified that there was dust in the area.

It appears to the court that the vital point is the density of the cloud of dust not at the moment of impact but a short measure or period of time prior thereto. The photographic evidence of skid marks by plaintiff's car gives ample testimony to the fact that plaintiff too saw the truck some 6 feet prior to striking it. It also occurs to the court that the density of the dust might vary from second to second depending on a number of factors, most important of which would be the amount of dust created by defendant's truck several hundred feet to the south.

It is our opinion that there was evidence in the record from which a jury could reasonably conclude that plaintiff was unable to see defendant's truck because of the dust created by the fertilizing operation. At best the evidence was conflicting on this fact. Reasonable minds could very well differ in concluding that plaintiff could or could not have seen the truck and for this reason we feel defendant's objection on this point is without merit. Cases cited by the defendant to substantiate his view deal with a situation where the testimony clearly shows plaintiff would have seen the object struck had he looked.

Concluding then that the plaintiff drove through a cloud of dust where his visibility was obscured, it is now necessary to consider whether plaintiff's action in driving through the area at the rate of 35 miles an hour was contributory negligence as a matter of law. Considerable authority is cited by the defendant to substantiate his position and he contends that one entering dust, fog, smoke or mist must stop until he is sure of his way, or if he drives into it must proceed at such speed that he can stop within the distance which he can see objects in his way. Failure to do so, as defendant contends, constitutes contributory negligence as a matter of law. Defendant cites Illincis Cent. R. Co. v. Oswald, 338 Ill. 270, 170 N.E. 247, Little v. Illinois Terminal R. Co., 320 Ill. App. 163,

50 N.E. 2d 123, Hogrefe v. Johnson, 271 Ill. App. 469, in support of this contention. In the Oswald case plaintiff was injured when she stepped between the rear of her automobile and an automobile that had a moment before, struck her car. While walking between the two cars a third automobile struck the rear end of the other car, pinning her between the two forward vehicles. Visibility in the area was completely obscured from the smoke caused by defendant's trains. Plaintiff had stopped at the railroad crossing when engulfed by the smoke from these trains. Her own testimony characterized her conduct as "careless" and her testimony showed conclusively that she knew of considerable traffic in the area and that visibility was nil. Reasonable minds could hardly differ in classifying her conduct in passing between the two stopped vehicles. By her own admission, had she stayed on the sidewalk she would not have been injured. In Little v. Illinois Terminal R. Co. (supra) plaintiff was injured when the car he was driving struck a street car at an intersection in Granite City, Illinois. He was acquainted with the intersection and knew that street cars frequently made left turns at the intersection, as the particular street car was doing at the time he collided with it. As he approached the intersection the area was covered with a mist or steam caused by a nearby steel company, completely obscuring vision. He reduced his speed to 15 miles

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an hour but proceeded forward although he could not see the front of his own car. The court said:

"He knew that under existing conditions, he could not see a car, if there should happen to be one there, and that it was possible that there might be a street car turning left."

In the Hogrefe case plaintiff's car struck the rear end of defendant's car while the latter was still traveling at the rate of 5 miles per hour. Visibility was obscured by a freezing rain that caused ice to form on the windshield of the car. In Duffy v. Cortesi, 2 Ill. 2d 511, 119 N.E. 2d 241, defendant made a left turn at an intersection and in so doing drove into the sun, which blinded his vision. There he struck a child and the child's grandmother. The court there noted a variance in like cases from state to state, then said:

" . . . however, in the ultimate analysis of the cases, although the measure of care may vary with the condition creating the obstructed vision, the roadway and traffic, it should be commensurate with the situation, so as to avoid inflicting injury on any person who may be using the street while the motorist is unable to see what is before him."

From this case it is apparent that other acts of the defendant contributed to make his conduct negligence as a matter of law.

In Harrison v. Bingheim, 350 Ill. 269, 182 N.E. 750, the defendant pulled his car over into the opposite lane of traffic to avoid colliding with another automobile that had pulled out of a parking space on his right. In so doing he struck plaintiff's car. The

court held him guilty of negligence as a matter of law in his failure to keep his car properly under control, pointing out that his duty was to keep his car under such control as to avoid striking vehicles in his own lane as well as keeping it under such control as to prevent its going into the opposite lane.

In Miller v. Burch, 254 Ill. App. 387, the defendant parked his automobile on the wrong side of the street facing in the wrong direction and to the right of another parked vehicle. Plaintiff's car collided with the defendant's car. The accident occurred in the evening and defendant's car did not have its lights on and the testimony established that plaintiff was driving with just his parking lights on, illuminating the road no more than 3 feet in front of his car. In affirming the lower court's decision for plaintiff the court said:

"Applying the above to the instant case, plaintiff was driving along a street at an hour and at a place where standing vehicles were not to be expected, on the path he was supposed to be, and in which he was driving. There is evidence that there were no lights on defendant's car. There was a light at the intersection, but the street was dark near defendant's car. These, and other circumstances. . . persuade us that all reasonable minds would not agree that the conduct of plaintiff constituted negligence. So the question of negligence should be treated as one of fact for the jury.

"Whether the place where plaintiff was driving, and had a right to drive, was a safe place to drive with such dim lights, but for the negligence of ^{the} defendant in being where he had no right to be.

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"In short, whether under all the conditions and circumstances surrounding plaintiff . . . his conduct was 'so violative of all rational standards of conduct applicable to persons in a like situation' that all reasonable minds would conclude that he was negligent. If it was not, then, although he may have been negligent as a matter of fact, he could not properly be said to be negligent as a matter of law."

Based on an examination of the cases and the law on the subject, this court must conclude that the defendant's claim is without merit. The authorities cited by the defendant are all distinguishable on the facts. There are elements in this case, such as the fact of the manner in which the truck was parked on the highway and causing the vision of motorists to become obstructed, that are not present in the authorities relied upon by defendant.

It should be further noted that this case differs from the cited cases in that there did not appear to be any reason for plaintiff to suspect danger as he drove through the area. "If a person has no reason to suspect danger he is not required to look for it." Mellish v. Thorne, 150 Ill. App. 237.

"It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any," . . .

the rule being that:

"Every one has a right to presume that others owing a special duty to guard against danger will perform that duty." . . .

"It may be that if there was evidence tending to



show appellee (plaintiff) had reason to apprehend such danger, the question of fact might properly be submitted to a jury."

Miller v. Burch, supra; Chicago Tel. Co. v. Commercial Union Assur. Co., Ltd., 131 Ill. App. 248. The day in question was clear and except for a small portion of the road obscured by the dust, vision was unobstructed. The plaintiff was driving along a country road where standing vehicles were not to be expected. He certainly had no reason to expect that one of defendant's vehicles would be parked upon the road with its wheels on the pavement near the very place where defendant created the dust cloud. These circumstances along with others show that all reasonable minds would not reach the conclusion that plaintiff was acting as no rational person would act under like circumstances and therefore the question to be determined was one of fact and not of law.

Defendant raises the point that there is proof that the left rear directional light on the truck was flashing. Janneaux testified he had turned it on after leaving the truck. The point, however, does not change our opinion. Plaintiff described the cloud as a "wall" of dust. He stated he did not see the light. Even if we hold that the light was in fact on and flashing, the jury still might logically conclude that if plaintiff's vision was obscured to such an extent that he could not see the truck he would not have been able to see the flashing lights.



When all the evidence regarded in its most favorable light for plaintiff is considered, we can not say plaintiff's conduct was so violative of all rational standards of conduct applicable to persons in a like situation that all reasonable minds would conclude he was negligent. We can not see under these circumstances that plaintiff's lack of due care or contributory negligence was other than a question of fact to be determined by the jury.

For the reasons stated herein the judgment of the lower court is affirmed.

Affirmed.

REYNOLDS and CARROLL, JJ., concur.

STATE OF ILLINOIS

APPELLATE COURT

THIRD

AT AN APPELLATE COURT, for the ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

35 I.A. 2183

PRESENT

HONORABLE BURTON A. ROETH, Presiding JudgeHONORABLE C. ROSS REYNOLDS, JudgeHONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 16th day
of MAY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10388

Agenda No. 3

Beatrice Foods Company, a foreign corporation, Jean Wankel, and Deborah Wankel, a minor, by Donald F. Wankel, her father and next friend,

Plaintiffs-Appellants,

vs

J. Henry Leucht, Sam Latino, P. H. Broughton, doing business as P. H. Broughton & Sons, Robert P. Broughton, and Nathan Robinson,

Defendants-Appellees.

#

P. H. Broughton, doing business as P. H. Broughton & Sons,

Counterclaimant-Appellee,

vs

Beatrice Foods Company, a foreign corporation,

Counterdefendant-Appellant.

CARROLL, J.

FILED

MAY 16 1962

Robert L. Conn, CLERK
APPELLATE COURT, 3rd DIST.

Appeal from the
Circuit Court of
Sangamon County

The trial court entered judgment upon verdicts adverse to the plaintiffs and in favor of defendant, P. H. Broughton, as counter-plaintiff. Plaintiffs' post trial motions were overruled and this appeal followed.

This litigation arises from a multiple vehicle collision which occurred on August 27, 1958, on Illinois Route 97 in Sangamon County, Illinois. At the point of the occurrence the highway is paved and consists of 2 lanes, one for northerly traffic and one for southerly. There was a hill about one-quarter mile to the south of the scene of the occurrence. The road curves at a point about 1,000 feet to the north. At the time of the collision the road was dry and visibility was good.

Defendant Latino was operating a 1957 Ford in a northerly direction on Route 97 and approached a farm tractor also being operated in a northerly direction by the defendant Luecht. Latino drove his car into the south bound lane and apparently started to overtake the tractor when he determined that he could not do so and in swinging back into the north bound lane struck the rear of the tractor. As a result of this collision, the Luecht tractor overturned near the center of the road and partially blocked both lanes of traffic. Following this collision, Latino drove his automobile from the paved portion of the highway and parked it on the east shoulder about 25 feet north of the overturned tractor. A few minutes later a road oiling truck arrived from the south which was owned by defendant P. H. Broughton and operated by defendant Robinson, an employee. When the Broughton truck arrived at the scene, it was driven onto the east shoulder of the highway off the pavement. Robert Broughton, also an employee of P. H. Broughton, Latino, and Luecht then attempted to right the

overturned tractor. There is some evidence that one or more of these three defendants sent other motorists to the north and to the south of the scene to warn on-coming traffic from both directions. The three defendants referred to attempted to move the tractor by connecting a chain to the tractor and to the road oiling truck. The first attempt at removing or righting the tractor failed because the chain was not long enough to permit the oiler to drag the tractor safely. The road oiler truck in attempting to move the tractor had been driven onto the pavement. While the attempt to remove the tractor was being made, automobiles arrived at the scene from both directions and stopped. One of these automobiles was occupied by plaintiff, Jean Wankel and her daughter, Deborah Wankel, age 7. The Wankel automobile which had been proceeding in a southerly direction, stopped approximately 30 feet north of the overturned tractor. About 20 minutes after the initial attempt to remove the tractor had failed, a truck operated by an employee of plaintiff, Beatrice Foods Company, approached the scene from the south. When the operator of the truck saw the halted traffic, he attempted to apply his hydraulic braking system, but he testified the braking system did not respond and he thereafter tried to slow or stop the truck by lowering the transmission gears. Plaintiffs' witnesses testified that following the occurrence, examination of the hydraulic braking system on the truck disclosed that a connecting rubber hose had been broken. The hose did not show any sign of cutting, it simply was broken in two. Such a break in a connecting hose would



result in a loss of vacuum in the system and prevent the hydraulic system from working properly. The cause of the break was not determined. Additional testimony adduced by plaintiff, however, disclosed that such a break would not cause a complete loss of braking efficiency. The braking system would respond to additional pressure applied to the brake pedal by the foot. Emergency braking, of course, was also available. Plaintiffs' proofs do not go beyond this explanation for its driver's failure to halt the truck. He was unable to stop the truck and drove it upon the eastern shoulder of the highway to a point where the Broughton oiler truck was then in a diagonal position on the paved northbound lane of the highway with perhaps one foot of it protruding onto the unpaved east shoulder. The Latino automobile was still in its parked position along this east shoulder about 30 feet to the north of the tractor. Apparently to avoid colliding with the Latino car, the Beatrice truck operator turned the truck to the left and collided with the Broughton vehicle. Following this impact the Beatrice truck then swerved across the highway and struck the Wankel automobile. As a result of this last impact the Wankel automobile was pinned between an earthen embankment on the west side of the highway and the Beatrice truck. Both Mrs. Wankel and her daughter were later removed to a hospital in Springfield. The extent of the injuries are not pertinent on this appeal.

Mrs. Wankel and her daughter and the Beatrice Foods Company joined as parties plaintiff seeking damages for personal injuries to



the Wankels and for damage to the Beatrice Foods truck. Negligence is charged against each of the defendants, Luecht, Latino, P. H. Broughton, Robert Broughton and Nathan Robinson. Issue was joined on the question of negligence of all defendants and P. H. Broughton filed a counter-claim against the Beatrice Foods Company for damages allegedly sustained by reason of the damage to his truck. The counter-plaintiff charged negligence and the Beatrice Foods Company joined issue thereon by its answer.

The plaintiffs urge 8 grounds as error and each of the grounds will be considered separately.

Plaintiff, Beatrice Foods Company complains that the trial court erred in failing to direct a verdict in its favor at the close of all the evidence on the ground that P. H. Broughton was guilty of contributory negligence as a matter of law. Plaintiff's theory is that Broughton was thus guilty because the truck was permitted to stand on the main traveled portion of the highway when it should have been parked off such paved portion, there being no emergency or exigency existing for warranting any other alternative. Plaintiff, Beatrice Foods, relied on Paragraph 185 of Chapter 95½, Ill. Rev. Stat.:

"...no person shall stop, park, or leave standing any vehicle whether attended or unattended upon the paved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway,..."

This plaintiff also cites 12 authorities to support its theory that counter-plaintiff Broughton was guilty of contributory negligence as



a matter of law in permitting the truck to stand upon the travelled portion of the highway. It should be noted that initially the Broughton truck was parked off the highway, but that it was driven onto the paved portion only after traffic in both directions had been halted and for the sole purpose of assisting in the removal of the overturned tractor. We do not feel that the conduct of the Broughton driver to be such as is contemplated by the statutory prohibition relied upon by counter-defendant Beatrice Foods. Moreover, we are inclined to the view that the violation in this case, if any, did not constitute a proximate cause of the resulting collisions. There was ample evidence for the jury to find otherwise, i. e., that the sole proximate cause of the resulting collisions was the negligence of the plaintiff, Beatrice Foods Company.

The plaintiff, Deborah Wankel, urges as error the trial court's failure to grant her post trial motion. This plaintiff, 7 years old at the time of the occurrence, takes the position that she could not have been guilty of contributory negligence as a matter of law and that the conduct of one or more of the defendants must have constituted the proximate cause of the injuries sustained by her. We believe the question presented to the trial court was whether there was sufficient evidence to warrant the jury's finding that the conduct of these defendants was not the proximate cause of the occurrence resulting in the injuries to Miss Wankel. In our view, the negligence, if any, of any of these defendants, merely created a condition, and the evidence seems to justify the jury's rejecting plaintiffs' charge

that such negligence, if any, was a proximate cause of the injuries sustained. It would seem that the conduct of these defendants, considered individually or collectively, merely created a condition and whether or not such conduct constituted negligence was for the jury to decide. We must assume that the jury was properly instructed as to negligence and proximate cause and found sufficient evidence to support their verdict. The trial court properly overruled Deborah Wankel's post trial motion.

All three plaintiffs argue that the trial court erred in granting the motions of defendants, Broughton, Robinson and Latino to withdraw from the consideration of the jury the following charge of negligence contained in sub-paragraph C of paragraph 11 of each count of the complaint and the amended complaint.

That the defendants, or some one or more of them, failed to halt their respective farm tractor or motor vehicles so as to leave a clear and unobstructed width of the paved, improved or main travelled part of the highway for the free passage of other vehicles, in violation of Section 185 of Chapter 95 $\frac{1}{2}$ of the Illinois Revised Statutes.

A careful review of all the evidence compells the conclusion that this charge was not applicable and was properly withdrawn by the trial court for the reason that the traffic obstruction alleged did not, as a matter of law, constitute a proximate cause of the damages claimed.

The plaintiff, Jean Wankel, complains that the trial court ought to have granted her post trial motion and her argument again



concerns fundamental questions dealing with plaintiffs alleged due care and defendants negligence as treated above. In view of our position with respect to the question of proximate cause it is unnecessary to consider this alleged error.

The plaintiff, Beatrice Foods Company, likewise claimed that the trial court erred in failing to grant its post trial motion, and we again find no error in the court's action.

All the plaintiffs contend that the trial court erred in granting defendant Luecht's motion for directed verdict at the conclusion of plaintiffs' evidence. We have considered such evidence in the light most favorable to plaintiffs, and find it insufficient to warrant submitting the question of Luecht's negligence to the jury. It appears that Luecht was struck from the rear and his tractor was overturned as a result of this impact. Following this collision he apparently expended his efforts towards preventing any subsequent collision and in clearing the road of his overturned vehicle. We believe it would have been error to submit the question of Luecht's negligence to the jury. If the question had been so submitted and decided adversely to Luecht, we would feel constrained to enter judgment notwithstanding such verdict or to reverse a judgment entered thereon as being against the manifest weight of the evidence.

The plaintiffs urge that the verdict with respect to each is against the manifest weight of the evidence. Plaintiffs'



position in this regard appears to be bottomed on the fact that there existed some conflict in the testimony with respect to the warning of traffic and the attempts to clear the highway of the overturned tractor. The rule is well settled that a trial court's judgment upon a ~~verdict~~ will not be disturbed unless an opposite conclusion be clearly evident. Stone v. Guthrie, 14 Ill. App. 2d 137. Such is not the situation in this case.

Plaintiff, Beatrice Foods Company, assigns as error the trial court's refusal to enter judgment in its favor notwithstanding the verdict on the Broughton counter-claim and also in denying its motion for a new trial on such counter-claim. As we have already indicated, we cannot agree that the verdicts were contrary to the manifest weight of the evidence. We are not presented with debatable questions concerning the accepting or rejecting of evidence by the trial court and we must assume that the trial court properly instructed the jury as to the law pertaining to each phase of the case. Accordingly the trial court did not err in refusing to grant Beatrice Foods Company the relief sought in its post trial motion.

The judgment of the trial court is correct in all respects and the judgment is, therefore, affirmed.

Affirmed.

ROETH, P. J. and REYNOLDS, J., concur.



STATE OF ILLINOIS

APPELLATE COURT

THIRD

AT AN APPELLATE COURT, for the ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

G5-I.A. 247

PRESENT

HONORABLE BURTON A. ROETH, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 16th day
of MAY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

1800-1801 (1801)

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1800-1801 (1801)

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10403

People of the State of
Illinois,

Plaintiff-Defendant in
Error,

-vs-

Coleman Harper,

Defendant-Plaintiff in
Error.

Agenda No. 3

Error to the
County Court of
McLean County.

REYNOLDS, J.

Coleman Harper was charged by information of unlaw-
fully having in his possession one hypodermic syringe and
one hypodermic needle, contrary to the Statute. A trial
by jury resulted in his being convicted and his punish-
ment was fixed at six months imprisonment. He brings this
writ of error to review judgment of conviction in the County

Court of McLean County.

The single question raised by the writ of error is that the information did not properly charge a crime. The information originally was in two counts, but the State was required to elect upon which count to proceed and elected to proceed under Count II. That count charged that Harper did, on the 1st day of May 1961, unlawfully have in his possession one hypodermic syringe and one hypodermic needle. This language, the plaintiff in error contends, is insufficient. People v. Prystalski, 358 Ill. 193 is cited. In that case the offense charged was that one Hazel Renke did then and there unlawfully have in her possession, for the purpose of administering a habit-forming drug, a certain hypodermic needle and syringe adapted to the use of habit-forming drugs by subcutaneous injection, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois. The wording of the statute at that time was as follows: "No person except a manufacturer or a wholesale or retail dealer in

surgical instruments, apothecary, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injection and which is possessed for the purpose of administering habit-forming drugs unless such possession be authorized by the certificate of a physician issued within the period of one year prior thereto." The court in that case held that to constitute the charge of an offense, it was incumbent upon the State to negative the exceptions set out in the statute, and that where an act is made criminal, with exceptions embraced in the enacting clause creating the offense, so as to be descriptive of it, the People must allege and prove that the defendant is not within the exceptions so as to show that the precise crime has been committed. In other words, where the exception is descriptive of the offense it must be negatived in order to charge the defendant with the offense. On the other hand, if the exception, instead of being a part of the description of the offense, merely withdraws certain acts or certain

persons from the operation of the statute it need not be negatived, and its position in the act, whether in the same section or another part of the act, is of no consequence; the court held that the omission of language in the information negativing that the possession had been authorized by the certificate of a physician issued within the period of one year prior thereto, was material to the charge, since the statute does not apply to anyone whose possession has, within one year prior thereto, been authorized by a certificate of a physician. In support of this rule, the court in that case cited People v. Berman, 316 Ill. 547, which was an alleged violation of the liquor laws then in force, and that case held that all necessary facts must be pleaded with reasonable certainty.

The People v. Prystalski case cited People v. Saltis, 328 Ill. 494. This was a case involving the charge of carrying a concealed weapon. That case was decided in 1927, and the statute in 1927, provided that the act was not applicable to certain persons, namely sheriffs, coroners, constables,



0407

policeman and many other peace officers, including express company officers. The information in that case contained no averment that the plaintiff in error was not a conductor, baggageman, messenger, driver, watchman, special agent or policeman employed by an express company and engaged in the discharge of his duties as such employee or agent. The court held the information sufficient.

Sokel v. The People, 212 Ill. 238, was cited. This was a **bigamy** case. The statute at that time (1904), defining "bigamy" exempted any person whose husband or wife had been continually absent from such person for a space of five years together, prior to the second marriage, and he or she not knowing such husband or wife to be living within that time. In that case the indictment did not negative that the wife had been continually absent from the defendant for a space of five years, etc., yet the court held that this was not necessary, and that all that need be negatived in an indictment or information is such exception as is descriptive of the offense. In that case, it was held, the crime of bigamy was defined as:- "Whoever, having a former husband or wife living, marries another

person or continues to cohabit with such second husband or wife in this State shall be deemed guilty of bigamy," and that the proviso following, with its exceptions, was not in any manner descriptive of the crime and that it need not be negatived but is a mere matter of defense.

The case of The People v. Green, 362 Ill. 171, involved an indictment charging possession of a device commonly used in the game called "policy". The statute under which the defendant was indicted exempted the possession of such a device by a public officer. The indictment did not so negative that the defendant was not a public officer, and the indictment was attacked on that ground. And the court in that case, citing the cases of People v. Prystalski, 358 Ill. 198, People v. Saltis, 328 Ill. 444 and People v. Talbot, 322 Ill. 416, said: "The rule in this State is, that where an act is made a crime and such exceptions are so embraced in the enacting clause creating the offense as to affect the description of the offense, the People must allege and prove that the accused does not come within the



exception - that is, where the exception is descriptive of the offense it must be negatived in order to charge the accused with the offense. If, however, the exception, instead of being a part of the description of the offense, merely withdraws certain acts or persons from the operation of the statute it need not be negatived, and its position in the act, whether in the same section or another part of the act, is of no consequence."

The case of People v. Prystalski was decided in 1954. The offense of having possession of instruments adapted for use of narcotic drugs by subcutaneous injection was amended in 1955 and now reads as follows:- "192.33 Persons permitted to possess instruments adapted for use of narcotic drugs by subcutaneous injection.) 1. No person, not being a physician, dentist, chiropodist or veterinarian licensed under the laws of this State or of the state where he resides, or a registered professional nurse, or a registered embalmer, manufacturer or dealer in embalming supplies, wholesale druggist, manufacturing pharmacist, registered pharmacist, manu-

facturer of surgical instruments, industrial user, official of any government having possession of the articles herein-mentioned by reason of his official duties, nurse or a medical laboratory technician acting under the direction of a physician or dentist, employee of an incorporated hospital acting under the direction of its superintendent or officer in immediate charge, or a carrier or messenger engaged in the transportation of such articles, or the holder of a permit issued under Section 5 of this Act, or a farmer engaged in the use of such instruments on live-stock, or a person engaged in chemical, clinical, pharmaceutical or other scientific research, shall have in his possession a hypodermic syringe, hypodermic needle, or any instrument adapted for the use of narcotic drugs by subcutaneous injection." Chap. 32, Section 192.33 Illinois Revised Statutes.

This Statute exempts certain persons. These exceptions are generally matters of defense. The People v. Green, 362 Ill. 171; People v. Prystalski, 358 Ill. 198. As the bigamy statute exempted certain persons from its operation, and the concealed weapon statute exempted certain peace officers and officials and employees of express companies and railroads, this hypodermic



syringe and needle statute exempts a number of persons. If the defendant came within the definition of any of the persons exempted it would be a matter of defense. The language of the statute exempting these classes of persons is in no way descriptive of the offense, which is the possession of a hypodermic syringe or needle by a person other than those exempted. The statute makes the possession by any other person unlawful. In the case of The People v. Berman, 316 Ill. 547, it was held that the information must contain sufficient averments to show that the act complained of was then and there prohibited and unlawful. In the instant case, the defendant was charged with unlawfully having in his possession one hypodermic syringe and one hypodermic needle, contrary to the Statute in such case made and provided. This language is clear and unambiguous. The language exempting certain classes of persons from the Act is not in any way descriptive of the offense. If the plaintiff in error could prove he was one of the class of persons exempted in the Act, that would be a matter of defense. If he did not come within the exemptions, then possession of the syringe and needle was unlawful. It is that simple.



The plaintiff in error contends that the law as amended in 1955 is little different than the one interpreted by the People v. Prystalski case. In the old law it was provided: "No person except a manufacturer or a wholesale or retail dealer in surgical instruments, apothecary, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injection and which is possessed for the purpose of administering habit-forming drugs unless such possession be authorized by the certificate of a physician issued within the period of one year prior thereto." Chapter 38, Section 1028, Ill. Rev. Stats. 1933. (The under-scoring is ours.) The words underscored are the words which were held by the People v. Prystalski case to be descriptive of the offense, and necessary in the information. In the 1955 statute, these words appear: "Or the holder of a permit issued under Section 5 of this Act", and the plaintiff in error contends that these words are no different than the language "unless such possession be authorized by the certificate



of a physician issued within the period of one year prior thereto", and come within the ruling of the People v. Prystalski case. With that contention we cannot agree. Section 5 of the Act is a long and complicated set of rules providing for the issuance of the permit and such language is in no way descriptive of the offense. In our opinion the words "or the holder of a permit issued under Section 5 of this Act", merely create another class of persons exempt from the act and are in no wise descriptive of the offense.

Our courts have been zealous to guard the rights of persons accused of crime. That is entirely proper and right. Yet, the right of a defendant in a criminal case to have every right safeguarded does not mean and it was never intended to shield a defendant by technicalities and matters of form which have no definite relation to the crime charged. In this case, to require that the State must not only state the charge that the plaintiff in error unlawfully possessed one hypodermic syringe and one hypodermic needle, contrary to the Statute, but to also state that he was not a physician, or any of the other classes of persons exempted by the Act, would add nothing to the



statement of the offense, descriptively or otherwise. To require this language in the information would also require the State to prove on the trial, that the plaintiff-in-error was not within the classes of exempted persons. Such a construction and requirement would not only be highly technical but would be absurd.

Here there can be little **doubt** that the plaintiff in error fully understood the nature of the charge against him. It is not contended that he did not receive a fair trial. It is not the province of this court or any reviewing court to seek to find some ground to set aside convictions where the defendant has received a fair trial upon clear and definite grounds set out in an information or indictment. Rather, it is the province of the reviewing court to examine the record and see that a proper charge was brought and that the defendant received a fair and impartial trial, and finding that these have been done, to affirm. To do otherwise would be to impede the administration of justice.

The judgment of conviction will be **affirmed**.

Affirmed.

ROETH, P. J. and CARROLL, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(Second Division)
FEBRUARY TERM, A. D. 1962

35 I.A. 2-264

PEOPLE OF THE STATE OF ILLINOIS)
on relation of petitioners, EARL)
FRALEY, LESTER COLLINS, FRANK)
SHAMORIAN and STANLEY A. DURKA,)
and said persons individually,)
Petitioners-Appellants,)
vs.)
HOWARD GUTHRIE, et al.,)
Respondents-Appellees.)
Appeal from the
County Court of
Lake County

SPIVEY -- P. J.

This is an appeal from an order of the County Court of Lake County denying leave to file a petition praying that court to issue a rule upon respondents to show cause why they should not be adjudged guilty of contempt of that court for certain violations of the primary election laws.

The respondents named in the petition were the city clerk and mayor of the City of Waukegan, Illinois, which operated under an aldermanic form of government.

The entire record consists of the petition (not filed with the clerk of the court), the order of denial, notice of appeal, proof of service of notice of appeal, and praecipe for record.

The order referred to finds that the court "does not have jurisdiction to entertain said petition" and concludes, "It is ordered that leave to file said petition is hereby denied."

We note that the record is devoid of any petition for leave to file said petition and any motion to strike or dismiss the petition.

The notice of appeal limits the appeal to the order denying leave to file the petition.

Appellants contend that the County Court has jurisdiction to punish by contempt proceedings by virtue of Articles 7-30 and 29-15 of the Election Code; Chap. 46, Sects. 7-30 and 29-15, Ill. Rev. Stat. 1959.

It is quite properly conceded by both sides that in a city primary election, operating under an aldermanic form of government, both the mayor and city clerk are chargeable with certain duties in connection with the primary election.

A county court has jurisdiction to entertain contempt proceedings for certain alleged violations of the election laws. Sherman v. People, 210 Ill. 552, 71 N.E. 618; Denman v. Fields, et al., 406 Ill. 145, 92 N.E. 2d. 739, affirming Denman v. Fields, et al., 337 Ill. App. 335, 86 N.E. 2d. 121.

Neither side has cited any authority upon the proposition that a petition of this nature must first be presented and leave granted to file, nor has our independent research unearthed such a requirement.

We entertain some doubt as to the appealability of the instant order. The procedure as evidenced by the record to say the least is not legalistic.

The closest analogy that we are aware of in this regard is the case of Smith v. Johnson et al., 313 Ill. 17, 144 N.E. 318.

We conclude the County Court of Lake County erred in denying petitioners' right to file the instant petition. The cause is therefore reversed and remanded with directions to set aside its order of April 12, 1961, denying leave to file said petition.

Reversed and remanded
with directions.

Wright, J. and Crow, J. concur

47-147



2nd DIVISION

2nd DIVISION

Abstract

Gen. No. 11564

Agenda 4

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A. D. 1962

(95 I.A. 2 265)

GERALD H. JORDAN, a minor, by
RICHARD JAMES JORDAN, his next
friend,

Plaintiff-Appellee,

vs.

BLANCHE D. JORDAN, Administratrix
of the Estate of Richard H. Jordan,
Deceased,

Defendant-Appellant

Appeal from the
Circuit Court,
Kane County,

Illinois.

CROW, J.

This action was brought to recover for alleged injuries and damages of the plaintiff, Gerald H. Jordan, a 17 year old boy, by his brother, Richard James Jordan, as his next friend, against the defendant, his mother, Blanche D. Jordan, as administratrix of the estate of his deceased father, Richard H. Jordan, who was the driver of the automobile in which the plaintiff was a guest passenger. The northbound motor vehicle in which the plaintiff was a passenger collided with a southbound vehicle near the intersection of Illinois Route No. 59 and Aurora Road, DuPage County, Illinois, on November 9, 1957, during the afternoon. The plaintiff charged his deceased father, Richard, with various wilful and wanton acts or omissions in the operation of his vehicle. The jury returned a verdict, upon which a judgment was entered, in favor of the plaintiff for \$15,000.00 from which the defendant has appealed, after denial of her post-trial motions for judgment notwithstanding the verdict, or new trial.

The defendant urges that the verdict is against the manifest weight of the evidence on the issues of the plaintiff's alleged contributory wilful and wanton misconduct, and the alleged wanton and wilful misconduct of the defendant, and that the Court erred in giving the plaintiff's instructions Nos. 2, 3 and 12. The plaintiff urges that the verdict finding the defendant's decedent guilty of wilful and wanton misconduct and the plaintiff free from contributory wilful and wanton misconduct is supported by the evidence, and the jury was properly instructed by the instructions set forth in Illinois Pattern Instructions.

The plaintiff, Gerald H. Jordan, was the minor son, then fourteen years of age, of Richard H. Jordan, deceased, and Blanche D. Jordan, now remarried and known as Blanche J. Brown. At about 2:30 p.m. on the afternoon of November 9, 1957, the defendant's decedent was driving his 1954 Chevrolet in a northerly direction on Illinois Route 59 with his son, Gerald, and a neighbor, Wesley Earl Lemmons, as passengers, both seated in the front seat with the driver, Richard H. Jordan, deceased. Their point of destination was a farm located on a highway called Butterfield Road, which is approximately 4 miles north of the intersection of Route 59 and Aurora Road. The decedent's Chevrolet in which the plaintiff was riding collided with a 1956 Ford being driven in a southerly direction on Route 59 by Rudolph Franciscy. The collision occurred at or near the intersection of Route 59 and Aurora Road. Aurora Road extends east and west at the point of the intersection and has a gravel surface. Route 59 has a two lane blacktop pavement and extends northerly and southerly. The point of collision was just south of the Route 59 and Aurora Road intersection. There was a 75 foot apron at the intersection leading onto Aurora road. The Bur-



lington Railroad overpass viaduct crosses Route 59 about 1/2 mile south of that intersection and a barn is located on the east side of Route 59 about 3/4 mile south of the intersection. Route 59 descends southerly under that viaduct, so that when a southbound vehicle approaching the viaduct is at the top of the incline to the north a northbound vehicle passing under the viaduct would not be visible.

The owner and driver of the southbound vehicle, the 1956 Ford, was 18 year old Rudolph Franciscy, also deceased, who had stopped at his parents' home in Warrenville and then drove his car, with his three younger brothers, Paul, Charles and George, as passengers, to a filling station located at Route 59 and Butterfield Road, for the purpose of filling the radiator with antifreeze.

The plaintiff called as occurrence witnesses in his own behalf, the three Franciscy brothers, George, Paul and Charles, who were passengers in the Franciscy southbound car, and Wesley Earl Lemmons, the passenger, with the plaintiff, in the front seat of his decedent father's northbound car.

Paul Franciscy, a passenger in the back seat of the southbound Ford, testified that his brother Ruddie (Rudolph) was driving the car in a southerly direction on Route 59. All he can remember is the car turning in front of them. He, Paul, first saw the northbound Chevrolet when it was partially in the southbound lane. Its left front fender was in the southbound lane. He estimated the speed of the Ford at about 65 miles an hour when it was some 100 or 200 feet north of the point of impact. The last time he saw the Chevrolet before the impact it was in the southbound lane of travel. At that time the Franciscy car was coming onto the intersection of the intersecting Aurora Road. He first saw that Jordan Chevrolet when it was about 50 feet away; he did not remember his

brother Rudolph trying to put on the brakes or blow his horn. He was "pretty sure" the accident happened in the southbound lane.

Charles Franciscy, also a passenger in the southbound Ford, in the front seat, by the door, testified that they were traveling south on Route 59 in the right hand lane. The accident occurred before they reached the intersection of Route 59 and Eola Road. The other car was making a left turn into the intersection when he first saw it. That car was going north. The collision occurred in the right hand (southbound) lane of travel for the Franciscy vehicle. He estimated the speed of the Franciscy vehicle at 55 to 60 miles an hour. He did not remember if his brother applied the brakes or blew the horn.

George Franciscy, a passenger in the front seat in the middle of the Franciscy car, testified that when he first saw the other car involved in the accident it was coming from under the viaduct; it swerved to the southbound lane of travel of the Franciscy vehicle. He didn't know how close the Jordan vehicle was to the intersection when he first saw it. The Jordan vehicle was approaching the Franciscy car, coming up the hill from the viaduct, when he first saw it. He did not remember his brother putting on the brakes or blowing the horn. The Franciscy car had passed a truck at about 70 m.p.h. about 1 mile from the point of the collision.

Wesley Earl Lemmons testified that he was riding on the right side of the front seat, with Gerald Jordan (the plaintiff) in the middle, and the deceased father driving the Jordan Chevrolet. Jordan was driving about 45 m.p.h. Prior to the accident Lemmons and the plaintiff were looking out of the right window of the car. Gerald Jordan had nothing to do with the driv-

ing. Neither Gerald or Lemmons made any objection to Jordan's driving. Lemmons saw the other car involved in the accident before the collision. It was traveling on the east side (northbound side) of Route 59 when he first saw it. At that time the Franciscy vehicle was 75 to 100 yards north of the intersecting road. The decedent said "Look, the fool is going to run into us." Richard Jordan reduced speed, then swerved to his right and pulled partly off the right side of the road. He had not yet reached the intersection. The car coming from the north turned to (its) left and then turned back to (its) right. Jordan then turned to his left, and the cars came together at about the middle of Route 59 and south of the intersection. He estimated the speed of the Franciscy vehicle at 85 or 80 miles an hour. He had very little memory of the facts until more than a year later. At that time he was involved in another accident and his memory returned.

State Police Sergeant Albrecht, who investigated the accident, testified that when he arrived at the scene the Jordan Chevrolet was facing in an east-west position, from 40 to 50 feet south of the center of the intersection. It was partly, - about 3 feet of its front end, - on the west shoulder of Route 59, the rest of the car extending on to the highway, - the west or southbound lane thereon. The Franciscy Ford was entirely on the shoulder on the west side of the highway turned over on its roof, and burning. It was northwest of the Chevrolet. Most of the debris was 40-50 feet south of the intersection and on the west side of the center line of Route 59 in the southbound lane. There was no debris on the east side or northbound lane of Route 59. There was a gouge mark in the southbound lane which was 40 feet south of the intersection. There were no skid marks. He did not observe any damage to the right side of the Chevrolet.

In addition to the foregoing there are several photographs of both automobiles, and of the scene of the collision, some taken very shortly after the occurrence, some x-rays of the plaintiff, hospital records, and bills for hospital and medical services.

The plaintiff Gerald H. Jordan was taken from the scene to Edwards Hospital in Naperville, where he was seen by Dr. Joseph Krumwine and Dr. Richard C. Bodie. He was in a semi comatose, though not unconscious, condition when seen by Dr. Bodie and would respond only to painful stimuli. His injuries consisted of compound fracture of the leg, (the upper third thereof), a depressed skull fracture, a twelve inch laceration of the back, and blood in the right ear canal. Dr. Robert Anderson, of Oak Park, a neurosurgeon, was called in for consultation, and performed a 2½ - 3 hour operation on Gerald Jordan in regard to the skull fracture. He was in the hospital 20 days. A cast was applied which extended from the toes of his foot to his groin. He had pain in his leg and back in the hospital. He had pain in his head after leaving the hospital. He returned to school in February, 1958 with a cast. He had done some work at the A and W Root Beer Stand but had not otherwise been employed before the accident. He returned to work for his uncle in the middle of November as an apprentice sheet metal worker earning \$25.00 a week. He also worked as a bus boy for three days. He was unable to do this type of work because he could not do a lot of walking on account of the weakness in his right leg. He had a medical checkup in 1958, and in 1961 just prior to the trial, but apparently no further treatment. At the time of the trial he was still subject to blackouts of 5-10 minutes duration, and his right leg tended to buckle. He failed to pass the physical examination for the Marine Corps in 1960. He had a scar from the skull injury



extending from his right eye to his right ear. The plaintiff testified at the trial, exhibited some of his injuries to the jury, and they had an opportunity to observe him. His total hospital, medical, and surgical expenses amount to \$1,883.70. The leg fracture itself apparently healed satisfactorily. No change in personality or actions were apparently evident from the skull fracture. The plaintiff had previously made a settlement with the estate of Rudolph Franciscy upon a covenant not to sue.

From our review of the evidence it appears that, with the exception of some of the testimony of the witness Lemmons, the decedent Jordan made or started to make a left turn into the path of the oncoming Franciscy vehicle, and the jury could reasonably have so inferred. The debris was in the southbound lane. The cars came to rest either entirely or partly on the west shoulder on the west side of the highway, the southbound side. All three passengers in the Franciscy car testified that the Jordan car turned left in front of their vehicle. The defendant's intestate was sober, awake, and apparently had his car under control. Prior to the accident he had been driving apparently at a reasonable speed and in a careful manner. Until the decedent's sudden left turn was started there was no occasion or reason for the plaintiff, his 14 year old son, to give any warning to the driver as to the oncoming Franciscy car. The Franciscy automobile was approaching from the opposite direction and clearly visible to a northbound driver, and the decedent in fact saw it. It is understandable that the jury, who had the opportunity to see and observe the witnesses, could reasonably conclude, under the circumstances, that the decedent, Richard H. Jordan, was guilty of wilful and wanton conduct. The testimony of Lemmons that he had very little memory of the facts until more than a year later is somewhat significant as to the weight the jury may possibly have attached

to some parts of his testimony. The jury had to decide the credibility of the witnesses and what, if any, parts of their testimony to believe, and there is no indication they acted arbitrarily in discharging their duties.

There is evidence tending to show, and from which the jury could reasonably infer, a gross want of care by the decedent, indicating a wilful disregard of consequences. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person, or property of others such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness such as charges the person whose duty it was to exercise care with the consequences of a wilful injury: LAYTON v. OGONOSKI (1930) 256 Ill. App. 461. In view of the physical facts, the testimony of the passengers in the Franciscy car, and the photographs, we believe this issue was a question of fact for the jury, and that the jury was warranted in finding that the defendant's intestate was guilty of wilful and wanton misconduct, and we cannot say the verdict is against the manifest weight of the evidence as to that: KUNZ v. LARSON (1957) 15 Ill. App. (2) 126. The only case the defendant refers us to on this issue is C. B. and W. R.R. CO. v. STUMPS (1870) 55 Ill. 367 and we do not perceive that it has any bearing hereon.

Nor do we believe the verdict to be against the manifest weight of the evidence on the issue of the plaintiff's freedom from contributory wilful and wanton misconduct. There was no occasion or reason, under the circumstances, for the decedent's 14 year old passenger son to try to give any warning, nor is there any evidence any such warning was necessary, or would have served any useful purpose. He had nothing to do with the driving. His decedent father's

speed was not unreasonable. The father apparently saw the oncoming Franciscy car, and did not need to be further warned thereof. There is no evidence he did, or failed to do, anything contributing to the collision. This accident apparently happened in a very short space of time. The jury could reasonably have concluded that remaining silent and not disturbing the driver was, under the circumstances, due care so far as the passenger was concerned. There is nothing to indicate the plaintiff at that time knew how to drive. He had no reason to doubt the competency of the driver: ZANK v. CHICAGO, R. I. and P. R. R. CO. et al. (1959) 17 Ill. (2) 473; Cf. SCHOEN v. WOLFSON (1931) 263 Ill. App. 414; DEES et al. v. MOORE (1948) 335 Ill. App. 318; KUNZ v. LARSON (1957) 15 Ill. App. (2) 126. Whether a plaintiff has been guilty of contributory negligence, - and by the same token whether he be guilty of contributory wilful and wanton misconduct, - is ordinarily and preeminently a question of fact upon which he is entitled to have the finding of the jury: LASKO v. MEIER et al. (1946) 394 Ill. 71. The cases referred to by the defendant on this issue are not at variance with our views and are not applicable to the present facts.

The defendant claims that the Court erred in giving the plaintiff's Instructions Nos. 2, 3 and 12. The plaintiff's Instruction No. 2 was Illinois Pattern Instruction No. 34.02 and was on the issue of damages. It was:

"In computing the damages arising in the future because of injuries, medical expenses and loss of earnings, you must not simply multiply the damages by the length of time you have found they will continue. Instead you must determine their present cash value. 'Present cash value' means the sum of money needed now which when added to what that sum may reasonably be expected to earn in the future, will equal the amount of damages, expenses and earnings at the time in the future when the damages from the injury will be suffered, the expenses must be paid or the earnings would have been received. Damages for pain and suffering, disability and disfigurement are not reduced to present cash value."

We see no error in the giving of it. The defendant's objection stated thereto at the conference on instructions was that there is no proof of any loss of earnings or other damages that are mentioned. We believe the evidence, considered as a whole, is sufficient. Moreover, the defendant does not in the points and authorities of her brief here raise any issue as to any alleged excessiveness of the verdict. Cf. READ v. FRIEL et al. 327 Ill. App. 532; NEVER v. STAGGS (1932) 264 Ill. App. 556.

Likewise, the plaintiff's Instruction No. 3, I. P. I. Nos. 30.01, 30.02, 30.04, 30.05, 30.06, and 30.07, correctly states the law as to the elements to be considered by the jury in determining damages, and we see no error in that respect. It was:

"If you decide for the plaintiff on the question of disability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damage proved by the evidence to have resulted from the wrongful conduct of the defendant: The nature, extent and duration of the injury. The disability resulting from the injury. The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries. The reasonable expense of necessary medical care, treatment, and services received. The value of earnings lost and the present cash value of the earnings reasonably certain to be lost in the future. Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guess or conjecture."

The defendant's objection thereto stated at the conference on instructions was the same as her objection to plaintiff's instruction No. 2. The element of damages for loss of ability to earn does not depend on whether the person is employed at the time of the occurrence: I. P. I. p. 144. What we have said as to instruction No. 2 is applicable to No. 3 also. The jury was adequately cautioned that its verdict must be based on evidence.

The plaintiff's Instruction No. 12, is as follows:

"The plaintiff claims that he was injured and sustained damages while exercising ordinary care and that the conduct of the defendant's decedent was wrongful in one or more of the following respects: Failed to keep a proper lookout for other vehicles lawfully upon the public way. As a driver of a motor vehicle making a left turn at an intersection failed to yield the right of way to a motor vehicle approaching from the opposite direction, said motor vehicle being within said intersection or so close thereto as to constitute an immediate hazard in violation of a Statute of the State of Illinois. As driver of a vehicle failed to drive his said motor vehicle upon the right half of the highway in violation of a certain Statute of the State of Illinois. The plaintiff further claims that one or more of the foregoing was the proximate cause of his injuries. The defendant denies that her decedent was guilty of wilful and wanton misconduct in doing any of the things claimed by the plaintiff and denies the plaintiff was in the exercise of ordinary care. The defendant further denies that the plaintiff was injured or sustained damages."

That instruction was in the form of I. P. I. 20.01, and in view of the testimony, we are of the opinion that the Court properly gave that instruction. We do not believe the jury could have been misled by the sentence beginning "The defendant denies etc.". Instructions are to be considered as a series and taken together the instructions here properly informed the jury. They were not, we believe, permitted to infer from this instruction the essence of a dispute as to a material fact actually in controversy. The plaintiff argues that the defendant failed to make a sufficiently specific objection to that instruction, in any event. The objection of the defendant made at the conference on instructions was:

"I object to this Instruction as I do not think it is in the language as stated in the book."

This objection does not, we believe, sufficiently comply with the requirement that all objections to an instruction shall be specific, and for that additional reason the giving thereof was not error: ONDERISIN v. E. J. and E. RY. CO. (1959) 20 Ill. App. (2) 73.

There is no reversible error.

We believe that, under the circumstances, the Court properly refused the defendant's motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial.

The judgment is, therefore, affirmed.

AFFIRMED.

WRIGHT, P.J. and SPIVEY, J. Concur

Abstract

Gen. No. 11574

Agenda 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A. D. 1962

2nd DIVISION

(35 I.A.2 266)

SHERWIN KRAMAN, etc.,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiffs-Appellants,		
vs.)	
REGAL MUTUAL INSURANCE COMPANY, et al.,		
Defendants-Appellees.)	

CROW, J.

This is a garnishment proceeding brought by the plaintiff Sherwin Kraman, for the use of Lyman Larson, Connie J. Larson, and Mary E. Larson, against Regal Mutual Ins. Co. and Prudence Mutual Casualty Co., defendants, as the result of a preceding action in the Circuit Court of Winnebago County, Cause No. 69831, where the plaintiffs were Lyman Larson, Connie J. Larson and Mary E. Larson, and Sherwin Kraman was the defendant. In that preceding action, Lyman Larson had recovered, on June 18, 1959, a judgment of \$40,000.00, Connie J. Larson a judgment of \$15,000.00 and Mary E. Larson a judgment of \$10,000.00, against Kraman. The Court entered a judgment for the defendants in this garnishment suit. On November 5, 1959, the Court had denied the defendant's Post Trial Motions in the suit of the Larsons against Kraman, Cause No. 69831. On this appeal, it is contended by the defendants garnishees that on or about November 5, 1959 an oral agreement was entered into between John T. Beynon, attorney for the defendants, and Bernard P. Reese,

Jr., attorney for the Larsons, that drafts in the sums of respectively \$15,000.00, \$9,000.00, and \$6,000.00, together with interest on \$65,000.00, the total amount of the original judgments, should be issued in partial settlement of the judgments in those respective amounts, plus court costs, the interest to be figured to a cutoff date of November 5, 1959. The plaintiffs, through their attorney, Bernard P. Reese, Jr., denied the existence of such an agreement with reference to an interest cutoff date and claim the pleadings in the instant case do not develop any reference to such an agreement involving the defendants' payment of their coverage, interest, and costs. The plaintiffs here contend that the sole issue is "if the defendant did make a payment on the principal of the judgment under its policy of insurance, to what date was it obligated to pay interest". This garnishment action is to endeavor to collect interest allegedly due and owing from and after November 5, 1959 and for which the plaintiff urges the defendants are liable. The garnishment action was instituted September 14, 1960.

The defendants Regal Mutual Insurance Company and Prudence Mutual Casualty Company were the insurers of the defendant, Sherwin Kraman, in the prior case, with a total coverage involved of \$30,000.00, and they were also liable under the policy for "all costs taxed against the insured in any suit and all interest accruing after judgment until the company has paid or tendered, or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon". Subsequent to November 5, 1959, the date of denial of the defendant's post trial motion in the prior suit, the defendants insurance companies herein made payments by checks on the judgments, in the amount of \$15,837.53 on the Lyman Larson judgment, which consisted of \$15,000.00 on prin-

cipal and \$837.53 on interest and costs in full through November 5, 1959; \$9,289.73 on the Connie Larson judgment which consisted of \$9,000 on the principal and \$289.73 as interest and costs in full through November 5, 1959; and \$6,193.16 on the Mary Larson judgment which consisted of \$6,000 on principal and \$193.16 interest and costs in full through November 5, 1959. Those checks of the defendants, while not delivered to Attorney Bernard P. Reese, Jr., the Larsons' attorney, until January 29, 1960, were nonetheless acknowledged as having been received on the 26th day of January by the judgment creditors, Larson, and their attorneys, H. Eugene Hallstrom and Bernard P. Reese, Jr., as evidenced by the partial satisfaction of judgment filed with the Circuit Clerk of Winnebago County on February 15, 1960.

On November 5, 1959, in the Circuit Court of Winnebago County, at the time the post trial motions were denied in the first suit, the insurance companies' attorney, Beynon, wanted a date to which he could figure interest for the convenience of the defendants insurance companies in issuing checks on the judgments. Beynon was told by the Larsons attorney that he could use the date of November 5th for figuring interest if the checks were forthcoming on or before November 19th. Subsequent to this conversation of November 5, 1959, all parties wanted an order from the Probate Court since Connie J. and Mary E. Larson were minors, resulting in some further delay on the part of the defendant insurance companies, so that the checks on the judgments were not tendered until January 29, 1960.

The plaintiff's theory is that garnishment in this proceeding should have issued against the defendants in that the amount due and owing on January 26, 1960, the date of payment, was a liquidated and undisputed amount and that the payment of a lesser sum than that

full amount due and owing on that date of payment, January 26, 1960, did not discharge their obligation; and that there was no agreement on the part of the plaintiffs Larsons in the prior suit to take less than the full amount due and owing on the date of payment, and even if an agreement had been made by the plaintiffs Larson in the prior case by their attorney to accept a lesser amount than the amount due and owing there was no consideration by the defendant insurance companies to support such a promise.

On December 1, 1959, petitions had been filed in the Probate Court of Winnebago County by Lyman A. Larson, as guardian, in the matter of the estates of Connie J. Larson and Mary E. Larson, minors, and orders entered thereon authorizing Lyman A. Larson, as guardian of the minors, to accept from Sherwin K. Kraman, in partial satisfaction of the judgment in favor of Connie J. Larson, the sum of \$9289.73, and to accept from Sherwin K. Kraman, in partial satisfaction of the judgment in favor of Mary E. Larson, the sum of \$6,193.16, and to execute all instruments necessary to partially satisfy the respective judgments to the extent of \$9,000.00, with accrued interest and costs, and \$6,000.00, respectively, with accrued interest and costs.

A letter dated December 2, 1959 had been sent by John T. Beynon to the law firm representing the insurance companies, enclosing thermofax copies of those orders of the Probate Court of Winnebago County, authorizing such partial satisfaction, so far as the minors are concerned, of the judgments and enclosing a breakdown of the judgments, costs, and interest in connection with the new drafts to be issued. That breakdown of interest memorandum was in the handwriting of Bernard P. Reese, attorney for the Larsons.

On December 21, 1959 drafts of Prudence Mutual Insurance Company, one of the garnishee defendants herein, payable to the following persons, as follows, were issued in the office of that Company:

"Lyman Larson, Guardian of the Estate of Connie Larson and Eugene Hallstrom and Bernard Reese, his attorneys, in the sum of \$9,289.73", which draft bore on its face a statement that it was issued in partial satisfaction of judgment. On the back of that draft, preceding the endorsements thereon are written the words: "In partial satisfaction of judgment" and "accepted in partial satisfaction as stated."

"Lyman Larson, Guardian of the Estate of Mary Larson and Eugene Hallstrom and Bernard Reese, his attorneys, in the sum of \$6,193.16," bearing the same wording on the face of the draft and on the back thereof, preceding the endorsements as recited above.

"Lyman Larson and Eugene Hallstrom and Bernard Reese, his attorneys, in the sum of \$15,837.58," bearing the same wording on the face of the draft and on the back thereof preceding the endorsement as recited above.

Those drafts were in the hands of Attorney John T. Beynon on January 21, 1960 and delivered to Attorney Reese on January 26, 1960. On February 15, 1960 partial satisfaction of the respective judgments was filed in the Circuit Court of Winnebago County. The checks were given Lyman Larson, Connie Larson, and Mary Larson, went through a bank, and were paid.

It appears that the delay in starting the process for issuance of the drafts from November 5, 1959 until December 2, 1959, the date of the Probate Court Orders, is chargeable to Attorney Reese, the Larsons' attorney.

It is also apparent that the defendants herein agreed to pay the full coverage under their policy, namely, \$30,000.00, plus interest from the date the original judgments were entered against Kraman and in favor of the Larsons to November 5, 1959, and the Larsons agreed to accept said sums, provided the checks were forthcoming on or before November 19th. It also appears that the minor plaintiffs Larsons, by their guardian, agreed to file a petition, or petitions, in the Probate Court of Winnebago County for authority to receive partial satisfaction of the original judgments and to secure orders to that effect. Each petition in that guardianship proceeding alleged, in substance, that Sherman Kraman had tendered to the petitioner for and on behalf of the respective ward in partial satisfaction of the judgment, the various sums referred to in the oral agreement indicated, plus interest on the total amount of the judgments from June 18, 1959, the date of entry, to November 5, 1959. The Orders of the Probate Court on December 1, 1959 authorized the guardian for the minor Larsons to accept the respective sums in partial satisfaction of the judgments to the extent of the sums therein referred to.

We are called upon by the defendants here to sustain the judgment below in this garnishment case upon the theory that an oral agreement was entered into to accept from the insurers of Sherwin Kraman the sum of \$30,000.00, their policy limits, plus interest on \$65,000.00, the total original judgments, from the date of the judgments to November 5, 1959. The defendants argue that inasmuch as there was an oral agreement for the acceptance of such sum and the subsequent delivery of the checks representing such sum and acceptance thereof, and the entering of a partial release of the judgments, this constitutes a complete contract fulfilled between the parties; that any delay in securing the checks for those amounts on the pro-

posed interest cutoff date of November 5, 1959 was due to the action of the attorney for the Larsons in securing an order of the Probate Court authorizing such partial settlements and satisfactions of the judgments as to the minor Larsons, and that the Larsons ratified and approved the agreement by entering the satisfactions on the judgment docket, pursuant to such approval of the Probate Court.

The plaintiff here argues that the question becomes "at what point did the insurer, the appellee, herein make a valid tender or payment of its face liability under its policy of insurance with the insured, together with the entire interest and costs due to the date of such tender or payment." It is true that the insurer was liable for interest "until the company has paid, tendered, or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon." The plaintiff argues that the defendants have failed to show a valid consideration for the alleged oral agreement. The plaintiff relies chiefly on the decision in RIVER VALLEY CARTAGE CO. v. HAWKEYE-SECURITY INSURANCE COMPANY (1959) 17 Ill. (2) 242.

Considering all the factual matters we believe the acceptance of the drafts by the plaintiffs which included the full amount of the coverage on the Kraman risk, \$30,000.00, plus interest on the original total judgments of \$65,000.00 from the date of entry, June 18, 1959, until November 5, 1959 constituted full performance on the part of the defendants here and thus created a contract binding, under the circumstances, upon the present plaintiff and use plaintiffs: PLUMB v. CAMPBELL (1888) 129 Ill. 101. A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee; want of mutuality is no defense where a contract is executed: Cf. THE MACCABEES etc. v. STONE et al. (1940) 306 Ill. App. 468. We interpret RIVER VALLEY CARTAGE CO. v. HAWKEYE-SECURITY INSURANCE COMPANY (1959) 17 Ill. (2) 242, as holding that the insurer is liable for interest on the total amount of the judg-

ment against the insured after entry of such judgment, even though the judgment is in excess of the sum for which the insurer is responsible, and that there was no legal tender in that case. The determination in that case is not applicable, we believe, to the facts in the instant case and the question here presented. Although the oral agreement here at the time it was made may have lacked mutuality, it became binding on the present plaintiff and the beneficiary use plaintiffs after their acceptance in fact of the drafts delivered in fact by the defendants, pursuant to the orders of the Probate Court. The Larsons made no attempt to set aside the orders of the Probate Court in the guardianships. Other points are argued but in our view there is sufficient consideration to support the agreement in question under the facts and circumstances here presented.

The judgment here was correct upon the law and evidence and it will be affirmed.

A F F I R M E D.

WRIGHT, P.J. and SPIVEY, J. Concur

2nd DIVISION

Abstract

(Abstract only)

General No. 11578

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(SECOND DIVISION)
FEBRUARY TERM, A. D. 1962

635 I.A. 2175

IN THE MATTER OF THE ESTATE OF
STEVE A. JOHNSON, Deceased;
PEARL CLEVELAND JOHNSON,

Claimant and Plaintiff-
Appellant,

vs.

VILLA PARK TRUST AND SAVINGS
BANK, Executor of the Estate of
STEVE A. JOHNSON, Deceased,

Appellee.

)
Appeal from
Probate Court of
DuPage County

SPIVEY--P. J.

Claimant-appellant filed her verified amended claim in the Probate Court of DuPage County, Illinois, in the amount of \$150,000.00, under and in compliance with Article XVII of the Probate Act, Chap. 3, Sects. 192 et seq., Ill. Rev. Stat. 1959. To this amended claim the executor-appellee filed an unverified motion to strike. The court without a hearing on the merits dismissed the claim. Appellant appeals from that order of dismissal.

This appeal was originally filed in the Supreme Court and by that court transferred here.

The amount in controversy being in excess of \$3,000.00, the appeal is taken directly to this court. (Section 329 of the Probate Act, Chap. 3, Sect. 329, Ill. Rev. Stat. 1959)

Appellant's claim is based upon an alleged oral agreement of January 1, 1950, with the decedent Steve A. Johnson to leave and bequeath and devise by his last will and testament his entire estate, real, personal and mixed, to the appellant.

The alleged agreement as set out in her claim recites claimant's marriage to the decedent on July 13, 1946; the birth of two children to the parties, Steve Gerald Johnson on September 15, 1946, and Keith Johnson on October 6, 1949; and a purported decree of divorce awarded claimant from decedent on October 25, 1947. Continuing, this alleged agreement recites that in consideration for decedent's promises, claimant agreed to forebear and refrain from taking any action to modify or amend the divorce decree; to forebear and refrain from instituting any proceedings against the decedent under the now Paternity Act with reference to Keith Johnson born on October 6, 1949; to keep and maintain a household for the two children; and to help care for the decedent in the event he became ill or if he required nursing or care. Again continuing, the alleged oral agreement recites that the claimant faithfully kept and performed all of her promises and agreements and detailed said performances including her care and nursing of the decedent during his lifetime. Concluding, the claim stated that the decedent failed to keep and perform his promises and agreements.

The grounds assigned by appellee's unverified motion to strike enumerated (1) the oral agreement is not enforceable under the Statute of Frauds, (2) the agreement is vague, indefinite, ambiguous, unfair, unjust, and unconscionable, (3) the agreement is not supported by an adequate consideration or legal consideration,

(4) the agreement is illegal and in violation of public policy, (5) the consideration is inadequate, (6) the claim does not show claimant cannot be made whole for the services rendered, (7) the agreement was not fairly entered into and lacks valid and adequate consideration and, the face of the claim does not appear to show that benefits that accrued to the decedent were legal.

The trial court's order found, "That said amended statement of claim is based upon the alleged breach of an alleged oral contract entered into between Steve A. Johnson and Pearl Cleveland Johnson on or about January 1st, A.D. 1950; that the Probate Court has no jurisdiction to enforce an alleged contract to make a will" and ordered, "It is, therefore, ordered, adjudged and decreed that the said amended claim of Pearl Cleveland Johnson be, and the same is hereby dismissed."

The Probate Court's order dismissing appellant's amended claim on appellee's motion for want of jurisdiction to enforce an alleged contract to make a will is erroneous.

That court's jurisdiction to entertain and enforce claims based upon contracts to make a will has been well established. Downing v. Harris Trust & Savings Bank et al., 318 Ill. 323, 149 N.E. 256; In re Estate of Johnson, 389 Ill. 425, 59 N.E. 2d. 825; In re Estate of Nichaus, 341 Ill. App. 454, 94 N.E. 2d. 525. This is true whether the alleged contract is oral or written.

It was said in the Downing case, "The claim filed in this case is clearly one for damages for breach of contract to make a will. That such claim lies is well established by the authorities. (1 Woerner's Law of Administration, - 3d ed--77)"

Apparently the trial court dismissed the instant claim on the sole ground that it lacked jurisdiction to enforce an alleged contract to make a will. (A ground not urged in appellee's

motion to strike.) This assumption appears to be borne out by the court's deletion of reference to the Statute of Frauds contained in a proposed order submitted for the court's consideration.

The trial court having erred in dismissing the claim for want of jurisdiction, this cause must be reversed and remanded.

The cause is reversed and remanded to the Probate Court of DuPage County with directions to vacate its order of January 3, 1961, dismissing claimant's amended claim on the grounds that the Probate Court lacked jurisdiction of the claim and to proceed in accordance with law.

Reversed and remanded
with directions.

CROW, J. and WRIGHT, J. Concur

In The

APPELLATE COURT OF ILLINOIS

Fourth District

ROBERT H. HOLMES,)	
)	
)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court of
-vs--	)	St. Clair County.
)	
JOHN CLAY & COMPANY,)	
)	
)	
Defendant-Appellee.)	

Honorable Harold O. Farmer, Judge Presiding.

Scheineman, J.

This is a suit for libel arising out of the same transaction as that recently considered by this court in Holmes v. Williamson, 33 Ill. App. 2d 458.

As related in that case, plaintiff consigned some sheep to a livestock commission house for sale. On being informed of this, the defendant Williamson, an attorney, wrote the commission house stating that his client was a partner of the plaintiff in the sheep and requesting information as to the weight of the sheep and the sales price. We held that this letter, which was the basis of the libel suit, was merely a quest for facts by an attorney performing his duty to his client and that it contained nothing derogatory, defamatory or libellous about or concerning the plaintiff. The summary judgment entered by the trial court in favor of defendant was therefore affirmed.

Now the same plaintiff has charged libel against the commission house, the defendant herein, and again the trial court on motion has entered a summary judgment for defendant from which plaintiff appeals.

The sole basis of this claim of libel is that the commission house, after receiving the Williamson letter, returned plaintiff's draft to his bank unpaid and with the notation that the "Ownership of sheep is in dispute." Plaintiff contends that this statement is libellous, that he is the sole owner of the sheep, that the defendant had a duty to remit the sales price to him, that the statement to the bank that the ownership of the sheep was in dispute was false and malicious and that the making of such statement caused him to be greatly injured in his good name, credit and reputation and further caused him mental anguish and discredit among worthy persons.

The defendant in its motion for summary judgment and the affidavit in support thereof stated that upon the basis of the Williamson letter it was of the opinion that there was a partnership arrangement between Williamson's client and the plaintiff, that the information given to the bank was for the purpose of explaining the non-payment of the draft and was done in good faith, without malice or wrongful intent, that it informed plaintiff by letter of its notice of another's claim on the proceeds and that it has always stood ready to pay the sales price of the sheep in the amount of \$176.21 to whomever might be the lawful owner.

It is difficult indeed to understand how anyone can claim libel on the basis of these facts. In the language of our previous opinion, it is ridiculous. A libel is a malicious publication which

tends to blacken the reputation of another, to expose him to public hatred, contempt or ridicule. Merely to inform a bank that it is withholding payment of a draft because of a dispute in the ownership of the proceeds doesn't begin to come within the confines of such definition. Business disputes over the interpretation of agreements and contracts are a common, everyday occurrence and merely to be involved in one, or to have another's attention called to the fact that you are involved in one, is in no sense derogatory or defamatory of itself. Nor, in the present case, can there be any implication or innuendo ascribed to the statement which would in any way tend to defame the plaintiff, impugn his integrity or subject him to public ridicule.

The determination of the one rightfully entitled to the proceeds of the sale of sheep is not before this court. In this cause, charging libel, there was no genuine issue as to any material fact whatsoever and defendant is entitled to a judgment as a matter of law. The judgment of the trial court is affirmed.

Judgment Affirmed.

Hoffman, P. J. and Culbertson, J., concur.

Publish abstract only.

FILED
AP 19 1962
James P. McLaughlin
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

48556

35 I.A. 2354



ARTHUR M. GELDEN, d/b/a
ARTHUR M. GELDEN CO.,)
Plaintiff-Appellee,) APPEAL FROM
v.) MUNICIPAL COURT
BENJAMIN H. BLACK,) OF CHICAGO
Defendant-Appellant.)

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiff is in the painting and decorating business in Chicago and employs 200 men. Defendant is a reputable Chicago lawyer, and owns the building at 166 East Superior Street, Chicago. Plaintiff sued defendant alleging that on April 23, 1957, at defendant's express order and request plaintiff supplied labor and materials in painting a fire escape at the premises, that he painted the fire escape in a good and workmanlike manner and that \$168.70 is the reasonable value of the labor and materials. Defendant denied the allegations. A trial without a jury resulted in a judgment against the defendant for \$168.70. He appeals.

In his brief defendant states that he does not dispute plaintiff's allegation that he painted the fire escape. Defendant contends that plaintiff painted the fire escape without defendant's request, consent or knowledge and in the alternative that before the fire escape was to be painted certain repairs were to be made thereon by an iron worker. The witnesses on the trial were the plaintiff, defendant and Warren Bishop, superintendent for the plaintiff.

In February, 1957, defendant called plaintiff on the telephone. Plaintiff's version of the conversation is that

defendant wished to have repair work done on the fire escape of the building and to have it painted. Plaintiff told him he did not do repair work and that defendant should hire a fire escape repairman "to take care of it first, and then we will come and paint it." Defendant said: "Alright, I will get the fire escape repairman." Plaintiff said he gave defendant "a couple of names" and defendant said: "After the repair is done, go ahead and paint it." Plaintiff testified that defendant did not ask for prices. Plaintiff directed his office staff to make out a requisition for painting the fire escape. The requisition stated that as soon as the repairing is done "go right ahead and paint it." The requisition went to Mr. Bishop, the superintendent. Plaintiff testified further that there were "some bolts and nuts to be tightened or something like that," and that after the repair work was done "we should go ahead and paint it."

The statement of claim alleged that the painting was done on April 23, 1957. The proof shows that the painting was done by a journeyman and two apprentices on April 15, 1957. In early April, 1957, plaintiff's superintendent noticed red lead spots on the fire escape, concluded that the repair work had been done and proceeded with the work. Subsequently, plaintiff mailed defendant a statement, which he refused to pay, saying he did not order the work. Defendant testified that the building department of the city gave him notice of violations relating to the fire escape. He called plaintiff on the telephone and inquired whether plaintiff repaired fire escapes. In this conversation there was also a discussion about painting the fire escape. Plaintiff told him he did only painting.

Defendant further testified that the repairs necessary on the fire escape were made in April, 1958, a year later, by Rossbach & Sons, Inc., and that no repair work was done in 1957. In answer to questions whether between the telephone conversation in February, 1957 and April 15, 1957, any work was done on the fire escape, the defendant answered: "Not to my knowledge." Defendant also testified that he did not see the fire escape between the time of the conversation in February, 1957 and April 15, 1957.

The superintendent was examined and cross-examined at length to determine whether the fire escape was repaired before it was painted on April 15, 1957. He said he "knew it was repaired." (Rec. 74). This witness testified: "They just don't red lead them unless they are repaired and the rust is removed. They don't paint red lead just over anything." (Rec. 75). The court declined to admit proffered defendant's Exhibits 3 and 4, being a receipt for payment for April, 1958 repair work and a proposal for that work. Defendant sought the introduction of these exhibits apparently on the theory that since the repair work was done in 1958, it was not done a year earlier, and that therefore the painting should not have been done by plaintiff.

Defendant insists that the judgment is against the manifest weight of the evidence. He points out that the burden was on plaintiff to prove his case by a preponderance of the evidence. There is a sharp conflict in the evidence. Plaintiff's evidence tends to prove that he was employed to paint the fire escape, the work to be done after the repairs were made. Plaintiff understood in their conversation that the painting was to be done after some bolts and nuts on the fire escape were

tightened. Defendant's position is that he did not make any contract with plaintiff to paint the fire escape, and in the alternative that plaintiff should not have painted it until the repairs were made. The considerable repairs which defendant contends were to be made prior to any painting were made a year later by Rossbach & Sons, Inc. When testimony is contradictory in a trial without a jury the credibility of the witnesses and the weight of the testimony are matters for the trial judge and his findings will not be disturbed unless manifestly against the weight of the evidence. An appellate court will not substitute its judgment as to the credibility of the witnesses for that of the trial judge who saw and heard them, unless the findings are manifestly against the weight of the evidence. On the record we cannot say that the judgment is against the manifest weight of the evidence.

Defendant urges that the trial court erred in refusing to receive in evidence an itemized statement dated February 4, 1958 of the necessary repairs proposed to be made by Rossbach & Sons, Inc., and a receipt showing a final payment of \$82 which completed the full payment of \$482 to that firm. We do not think that the trial court erred in declining to receive these proffered exhibits. The issues were whether there was an agreement between the parties to do the painting, and if so, whether the painting was done before the repairs were made. The telephone conversation concerning the agreement took place in February 1957 and the painting was done on April 15, 1957. A proposal by Rossbach & Sons, Inc., to defendant made a year later and a receipt for a balance paid on the work done by that firm

a year later is not material to the issues. During the trial the defendant appeared to recognize a deficiency in his proof concerning the repairs. He asked for a continuance, saying: "I will bring in an investigator because I see now I will need him. * * * I will bring in additional proof by an investigator from the City of Chicago who saw the fire escape from February of 1957 until after April of 1958 and he will testify as to this document." Defendant's motion for a continuance "in order to get additional evidence and more proof" was denied. Defendant does not contend that the court erred in denying the continuance.

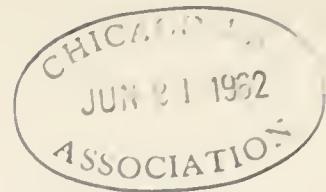
The judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P.J., and BRYANT, J., concur.

48564

J
35 I.A. 354



LOULENA, INC., an Illinois Corporation,) APPEAL FROM
Plaintiff-Appellee,)
v.) SUPERIOR COURT
WEST HARVEY HOME SITES, INC., et al.,) COOK COUNTY
Defendants-Appellants.)

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal is taken from a judgment on the pleadings in favor of plaintiff in the sum of \$4800. This amount represented the balance of earnest money deposited with defendants under a contract for the sale of real estate. The court found that the contract was void for lack of mutuality and decreed the return of the balance of the earnest money to plaintiff.

Defendants-appellants' theory briefly is that even if the contract initially lacked mutuality of obligation or remedy at the time it was entered into, this was cured by performance by the party who was not initially bound. Plaintiff therefore is not entitled to elect to accept the benefits of a portion of the contract, seek to enforce it by way of specific performance as a valid contract, and also contend that it was void for lack of mutuality entitling plaintiff to the return of the balance of earnest money deposited with defendants.

The pleadings consist of a complaint in one count asking for specific performance or in the alternative for judgment for \$4800, defendants' answer, plaintiff's motion for judgment on the pleadings, and defendants' motion for a summary decree supported by affidavits and exhibits which were not replied to by plaintiff.

The essentials of the contract as shown by the pleadings and exhibits are as follows. On December 2, 1958 plaintiff entered into a written agreement entitled "Real Estate Sales Contract" with West Harvey Home Sites, Inc., one of the defendants. Plaintiff was to purchase 84 vacant lots owned by defendants. Bardwick Enterprises, Inc., the other defendant, acquired West Harvey Home's interest. Both defendants occupy the same position regarding the obligations under the contract. Plaintiff agreed to purchase and defendants agreed to sell the lots at \$40 per front foot, and defendants were to convey a good and merchantable title by trustee's deed. Plaintiff was obligated to purchase a minimum of four lots per month beginning March 1, 1959, and was to complete the purchase of all the lots by December 31, 1959. Plaintiff was to deposit \$6300 with defendants as earnest money from which \$100 would be deducted and applied to the purchase price of each lot. On December 31, 1959 defendants were to deliver to plaintiff a stamped trustee's deed conveying the balance of the lots not conveyed previously together with opinion of title, and plaintiff was to pay the balance of the purchase price less any balance of earnest money.

The alleged lack of mutuality arose by virtue of paragraph 12 of the contract which provided that if the seller (defendants) shall default, the purchaser (plaintiff) shall have no right to require specific performance or to recover damages for breach of the contract. Whereas paragraph 13 provided that if the purchaser should default the sellers could terminate the contract and retain any unused portion of

the earnest money as liquidated damages, and this would be the sellers' only remedy for the purchaser's default and the sellers would not have the right to require specific performance or to recover damages for breach of the contract.

Both parties undertook performance. Plaintiff deposited the \$6300 earnest money, and defendants conveyed the entire property to the LaSalle National Bank, as trustee, with defendants as beneficiary. Periodically plaintiff purchased 39 lots, paid the specified price, and received credits of \$100 per lot from the earnest money, excluding lots purchased under Exhibit B. The latter plays no role in this litigation, but explains a seeming discrepancy in the balance of the earnest money.

Plaintiff defaulted by failing to purchase all of the lots by December 31, 1959, as required by the contract, and on that date defendants still had 45 lots which had not been conveyed and a balance of \$4800 of the earnest money deposit. Defendants notified plaintiff on January 5, 1960 by registered mail that plaintiff was in default and demanded payment of the balances due on the remaining lots. Plaintiff took no action and on February 18, 1960 defendants sent plaintiff a written notice that all payments were forfeited as liquidated damages as provided by the contract.

Then plaintiff brought suit on April 14, 1960 for specific performance and prayed in the alternative for judgment of \$4800, the balance of the earnest money retained by defendants as liquidated damages. Plaintiff obtained judgment on the pleadings for the \$4800, and this appeal followed.

Defendants' first contention on appeal that the contract constituted at law an option which expired by its own

terms is without merit. The terms of the contract themselves negate any such distorted construction, and this view was not argued in the trial court. The contract was clearly intended to be and was acted upon as a bilateral contract for the sale of real estate.

However, we agree with defendants' second argument that any initial lack of mutuality was cured by performance by the party who was not initially bound to perform. The record shows without doubt that defendants performed their obligations under the contract, stood ready to convey the remaining lots, and that plaintiff was the defaulting party who later sought to enforce the contract by specific performance, or alternatively to have it declared invalid after it had been executed by defendants and had expired by its own terms.

The relevant time in determining whether there is mutuality of remedy or not, under the facts of this case, would be the time of breach rather than the time at which the parties entered into the contract. *Hodorowicz v. Szulc*, 16 Ill. App.2d 317; cf. *Smithereen v. Renfroe*, 325 Ill. App. 229, at 244. Want of mutuality is no defense where a contract is executed, *The Maccabees v. Stone*, 306 Ill. App. 468, or where the party who is not bound to perform does perform. *Corso v. Dixon*, 348 Ill. App. 378. Both of these principles are reaffirmed in *Hall v. Gruesen*, 22 Ill. App.2d 465, at 469. Either would apply here because defendants fully performed until plaintiff defaulted and the contract expired of its own terms. Thus the initial want of mutuality by virtue of paragraph 12 of the contract is irrelevant. A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee. *Plumb v.*

Campbell, 129 Ill. 101, cited with approval in The Maccabees v. Stone, *supra*, at 471 (executed contract), and *In re Estate of Weil*, 291 Ill. App. 208, at 219 (performance under a unilateral contract).

A party to a contract may not perform it to the extent that it is beneficial to him and then hide behind its want of mutuality when called on to perform that part of the contract which is beneficial to the other party. *Taylor v. Scott, Foresman & Co.*, 178 Ill. App. 487, at 495, citing cases.

We therefore hold that the contract here in issue was valid and binding by virtue of performance, and defendants are entitled to enforce the provisions of forfeiture of the balance of the earnest money because of plaintiff's default in failing to purchase the remaining lots within the specified time.

An examination of the pleadings and affidavits shows, as plaintiff admits in his brief, that no bona fide issue of fact exists, and defendants are entitled to summary judgment. *People ex rel. Sharp v. City of Chicago*, 13 Ill.2d 157; *Roe v. Cooke*, 350 Ill. App. 183.

The judgment on the pleadings for plaintiff is reversed and the cause is remanded with directions to enter judgment in favor of defendants and against plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS

FRIEND, P.J., and **BURKE**, J., concur.

ABST.
48626



MIRIAM S. BICKSON,)
Plaintiff-Appellant,)
v.)
IRWIN S. BICKSON,)
Defendant-Appellee.)
APPEAL FROM SUPERIOR COURT
COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

On June 7, 1961 plaintiff filed a petition to vacate portions of a decree entered on February 10, 1959, granting plaintiff a divorce from defendant and incorporating a written agreement for a property settlement between the parties. That decree, stated, *inter alia*, that it barred all rights of either party arising from their marriage or out of their business relationships. Plaintiff's petition to vacate did not seek to upset the divorce, but asked rather that the settlement agreement be rescinded and the interests of the parties be adjusted on the basis of an accounting as to the value of plaintiff's one-half interest under a partnership agreement.

The petition was brought under Section 72 of the Practice Act and alleged that the settlement agreement was executed by plaintiff solely because of defendant's fraudulent representations and at a time when plaintiff was under mental stress brought on by her husband's conduct; that plaintiff had no knowledge of the fraud until after July, 1960, when she discovered allegedly fraudulent acts such as wrongful charges to the partnership account, forging of checks, and improper diversions of money. Defendant moved to dismiss the petition principally on the grounds that it contained allegations of

matters not of record in the divorce proceeding, that it had not been filed within two years as required by Section 72 of the Practice Act, and that plaintiff's allegations that she knew nothing of the fraud until after July, 1960, were negated by the fact that in 1956 in a complaint for separate maintenance by plaintiff (which complaint was dismissed without prejudice on plaintiff's motion), she had made similar allegations of fraud and unfair dealing. The court granted the motion to dismiss after a brief hearing and argument by counsel, although no evidence was taken, and this appeal followed.

A brief history of the parties and their litigation will be helpful before proceeding to the merits of this appeal. Plaintiff and defendant were married on January 24, 1935, and were divorced in an earlier proceeding on March 5, 1943. Under this decree plaintiff became the owner of two currency exchanges. On July 17, 1943 they were remarried. Because of the remarriage the parties entered into a partnership agreement dated August 1, 1943, which provided, *inter alia*, that the parties would be partners in the operation of currency exchanges (defendant owned other exchanges); capital was then owned in equal shares; any further capital would be advanced in equal shares; neither party would spend, give or make away with any partnership property; proper books of account would be kept and each partner would have access thereto; and that the partners would be entitled to the net profits in equal shares, to be divided each year after the general account had been taken.

A complaint for separate maintenance, dissolution of the partnership, accounting, injunction and other relief was

filed by plaintiff on January 13, 1956. On motion by plaintiff the complaint was dismissed without prejudice and the parties became reconciled.

On January 28, 1959 plaintiff filed for divorce. Although the hearing was brief, plaintiff stated that she was satisfied with the property settlement and knew she was barred from asking for anything beyond what was provided in the agreement. The divorce decree was entered on February 10, 1959. At that time the parties had three children, then 18, 16, and 14 years, respectively. The court found that the agreement was fair and reasonable and freely entered into by the parties with full knowledge of all facts and circumstances connected therewith. The agreement was incorporated into the decree which also stated that all other rights arising out of the marriage or claims of any kind arising by virtue of their business relations were barred, except as provided in the agreement and decree.

The instant petition seeks the value of plaintiff's one-half interest under the partnership agreement which was her separate property, and there is no question as to the fairness of the property settlement in a manner suitable to the station in life of the parties. By plaintiff's own computations she received \$65,000 over and above her separate interest as a partner and joint tenant, and total assets in excess of \$100,000, including two currency exchanges. In addition there are alimony payments in the sum of \$25,000 which are current, and which have aggregated presently to \$3,000; there is \$4,000 per year child support, plus extraordinary medical, dental and hospital expenses, and a college education for the children; and there is an

assignment to the wife of the co-operative apartment, furniture, title to a motor vehicle, and the maintenance in her interest of \$25,000 of insurance.

However, since all other rights in the partnership were specifically barred by the agreement which was incorporated into the decree of February 10, 1959, plaintiff seeks to vacate portions of that decree under Section 72 of the Practice Act. Plaintiff's theory on appeal is that the court was required to receive evidence on the allegations of fraud as to acts concealed from her and first coming to her knowledge after July, 1960, because Subsection 3 of Section 72, ILL.REV.STAT.1961, ch. 110, § 72(3), specifically excludes from the two year limitation the time during which the ground for relief was fraudulently concealed.

Admittedly, if fraud be shown it vitiates all transactions touched by it. *People v. Gilmore*, 345 Ill. 28. And a release, the execution of which was obtained by fraud or coercion, is not a bar to an action by the person executing the release. *James v. James*, 14 Ill.2d 295. Therefore, there is no merit in the proposition advanced by defendant that acceptance of payments of benefits by plaintiff bars the petition to vacate. Nor would the doctrine of failure to make tender be applicable, since equity is not bound by the strict rules of tender. *Kuzlik v. Kwasny*, 383 Ill. 354; *Ruggles v. Selby*, 25 Ill. App.2d 1.

However, we think that the lower court properly sustained defendant's motion to strike the petition to vacate, because the record before us clearly shows that plaintiff knew of the alleged mismanagement of the partnership funds and

diversion of monies at least as early as 1956 when she filed a suit for separate maintenance. Consequently she knew about her husband's questionable way of running the partnership when she agreed to the rather substantial property settlement which she now seeks to vacate. Even assuming that she discovered more particular or alarming evidence of chicanery in July of 1960, this does not negate her prior knowledge of her husband's conduct which she seeks to use as the basis for vacating the property settlement.

There is a literal similarity between several of the charges in the 1956 complaint and the instant petition to vacate. There is no question here of res judicata, as defendant admits, because that complaint was dismissed without prejudice. Defendant states, rather, that he placed the substance of the 1956 complaint into the record before the trial court in the instant petition to show that plaintiff was complaining here of the same acts to which she referred in her 1956 complaint, and that no credence could be given to plaintiff's claim that the alleged fraud was newly discovered. Paragraph 12 of Count II of the 1956 complaint will suffice here as an example:

"12. The defendant, Irwin S. Bickson, with full knowledge of the trust and confidence placed in him by the plaintiff and by virtue of their relationship as husband and wife did so handle, conduct and manage the affairs of the said partnership business so as to exclude the plaintiff from the knowledge of the happenings therein, and because of his dominance in the relationship between them developed the same to the point where he knew, because of his treatment of the plaintiff and the emotional and physical state to which she had been reduced he could operate such affairs without any interference from her. As time went on, he progressively gave less and less attention to plaintiff's rights in the matter and began to



treat the entire business as his own, using the funds and profits thereof for his own private gain and he never accounted to the plaintiff for his conduct of said business; that he has made large, unusual and improper charges against the said business and diverted funds therefrom, that on several occasions when the plaintiff asked him for some type of explanation as to what was happening therein, he promised her that he would some time in the future make proper accounting, but that each time he failed so to do; that notwithstanding his many promises in that regard the said defendant has still failed to account to the plaintiff in connection with the affairs and assets of said partnership."

The conclusion is inescapable that plaintiff had prior knowledge of the substance of the acts of which she now complains and this cannot be avoided because it may have been more convenient for counsel to transplant the language of the 1956 complaint to cover the allegedly newly discovered facts of 1960. Furthermore, there is no justification for waiting eleven months after the allegedly discovered facts before bringing the petition to vacate. Plaintiff still had seven months after the discovery in July, 1960 during which a petition to vacate would have been within the two year period generally provided in Section 72 of the Practice Act.

In view of our discussion we hold that the motion to dismiss was properly granted since the petition does not adequately show fraudulent concealment of the grounds for relief so as to come within the saving portion of Section 72(3) of the Practice Act. Plaintiff's strong reliance, therefore, on James v. James, 14 Ill.2d 295, and Ellman v. De Ruiter, 412 Ill. 285, is of no avail. Some finality must attach to decrees of divorce and property settlements, which finality increases as

time goes on, and the courts show a proper reluctance to vacate such decrees unless the petitioner shows a clear right to such relief. See, e. g., *Smythe v. Smythe*, 28 Ill. App.2d 422 (Abst.), where the allegations of fraud were regarded as insufficient and plaintiff had evidently been aware for some years of the alleged grounds for relief; *McDonald v. Neale* (Docket No. 48292, handed down by the First Division of this District on April 30, 1962), where evidence was taken on the allegations of fraud, but at the close of petitioner's evidence the court dismissed the petition for want of equity; *Smith v. Smith*, 334 Ill. 370. Although the latter case did not consider the charges of fraud regarding the procurement of the voluntary settlement since the petition was brought pursuant to Section 18 of the Divorce Act, the court in the James case, *supra*, distinguished the Smith case as being a petition for modification which was not filed until nine months after the decree had been entered, whereas the motion to vacate in the James case was filed within thirty days after the court's decree had been entered.

In a petition to vacate a divorce decree, all presumptions are in favor of the decree. *Neitzke v. Neitzke*, 15 Ill. App.2d 473. This presumption would also apply to the vacating of a property settlement incorporated into a divorce decree, and plaintiff has not shown fraudulent concealment, newly discovered, which would justify vacating portions of the decree of February 10, 1959.

The decree of dismissal is affirmed.

DECREE AFFIRMED.

FRIEND, P.J., and BURKE, J., concur.

48636

ABST



MASTERCRAFT LAMP COMPANY,) APPEAL FROM
Plaintiff-Appellant,) MUNICIPAL COURT
v.) OF CHICAGO
TED MORTEK,)
Defendant-Appellee.)

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from an order entered in the Municipal Court dismissing his suit for damages arising from defendant's breach of an employment contract. The order did not specify the grounds for dismissal, but the motion to dismiss argued primarily that the issue of defendant's breach of contract had been determined in a prior declaratory judgment action between the same parties in the Circuit Court of Cook County.

Plaintiff contends that the instant suit for damages is based on a different cause of action; that even if the cause of action were the same, plaintiff could bring this action because declaratory judgment actions are excepted from the usual rules of res judicata; and, alternatively, that this suit would qualify as an application for further relief to any court having jurisdiction allowed by Subsection 3 of the declaratory judgment statute. ILL.REV.STAT.1961, ch. 110, § 57.1, (3).

The facts underlying the dispute between the parties need not be reviewed here since they are summarized in the Appellate Court decision on the declaratory judgment. Mastercraft Lamp Co. v. Mortek, 28 Ill. App.2d 273. Plaintiff would have this court read the prior declaratory judgment narrowly

as showing only that a stock purchase contract was unenforceable for failure of consideration caused by defendant's breach of the employment contract. The Appellate Court decision shows that the court considered and found that "defendant had breached the employment contract." And paragraph 6 of the prior amended complaint stated such finding was essential to the full judgment sought in the Circuit Court. It is clear that even if the dispute originally could have presented several causes of action, the issue of a breach of the employment contract was adjudicated and the question of damages as a result of the breach is not in itself a different cause of action. If plaintiff was entitled to further relief subsequent to the declaratory judgment, this was available upon petition to the Circuit Court in accordance with the provisions of the declaratory judgment statute. ILL.REV. STAT.1961, ch. 110, § 57.1, (3).

Plaintiff's final argument that this action is in essence an application for further relief under the declaratory judgment statute is incorrect. The amended complaint was not entitled "petition" or in the form of a petition; it did not purport to be brought under Subsection 3 of the statute; and it was brought in a different court from that entering the declaratory judgment. While there is no direct holding that supplemental relief must be brought in the same court, the Historical and Practice Notes to Subsection 3 of the declaratory judgment statute show that supplemental relief is not limited to further declaratory relief, but that "such further relief

may include assessment of damages or other affirmative relief obtainable by petition in the same action and in the same court in which the declaratory relief was obtained." S.H.A. ch. 110, § 57.1, p.225.

Plaintiff filed this amended complaint in the Municipal Court during the pendency of the appeal on the declaratory judgment. To allow the determination of essentially the same issues, or derivative ones such as the question of damages, by different courts, violates the sound policy expressed in *Hudson v. Mandabach*, 22 Ill.App.2d 296, at 298:

"To hold that there could be a declaratory judgment action in one court simultaneously with a case pending in a different court, involving the same parties and a similar issue, would open the door to abuses. This could result in multiple litigation, unavoidable interference and conflict among the courts and attempts to obtain persuasive findings or advisory opinions with the intent to affect the outcome of concurrent cases."

The claim for damages had accrued at the time the prior declaratory judgment action was filed, and could easily have been presented to the circuit court at that time. Indeed the final state of the prior pleadings casts some doubt on whether the suit should not have been for damages for breach of contract rather than for declaratory relief, since everything had happened by then and plaintiff could have secured a complete remedy. The Practice Act was designed to avoid piecemeal litigation, rather than encourage it. However, the issue of whether plaintiff would now be barred from seeking supplemental relief by virtue of an election in failing to ask the circuit court to reserve jurisdiction on the question of damages is not properly presented here, and we need hold only that if plaintiff

-4-

is entitled to damages as supplemental relief under a declaratory judgment that such relief must be sought by proper petition in the court awarding the declaratory judgment.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P.J., and BURKE, J., concur.





48642

ALBERT BUDLOW,

Appellant,

v.

APPEAL FROM

SUPERIOR COURT,

COLE PRODUCTS CORPORATION an Illinois Corporation, BENJAMIN JOSEPH STUTZ, and SURF INVESTMENTS LIMITED, a Company Incorporated under the Laws of the Province of Ontario in Canada,

COOK COUNTY

Appellees.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

The plaintiff, Albert Budlow, a citizen and resident of Miami, Florida, brought suit against Cole Products Corporation, an Illinois corporation, Benjamin Joseph Stutz, and Surf Investments Limited, a company organized in Ontario, Canada, for damages arising out of the alleged breach of an employment agreement wherein Surf employed Budlow to sell automatic vending machines for Cole. Stutz did not file his appearance nor did he participate in the case. On August 8, 1961 the trial court, without prejudice, dismissed the complaint for the reason that it failed to allege an offer to submit the subject matter of this suit to arbitration, in accordance with the provisions of the employment agreement. Plaintiff filed his notice of appeal on August 28, 1961.

The agreement on which this suit is based provides that in the event of a dispute it shall be referred to three arbitrators, one to be appointed by the employer, the second by the employee, and the third by the two arbitrators representing the parties to the dispute. Following the order of dismissal of the complaint on August 8, 1961 and simultaneously with initiating

an appeal from the adverse judgment, plaintiff on August 28, 1961 advised Surf by letter that pursuant to the provisions of the employment agreement he had, through Miami Beach, Florida counsel designated Morton C. Rubenstein of Chicago as his arbitrator, and he requested defendant Surf to select its arbitrator. Thereafter, on September 6, 1961, Surf advised plaintiff's Miami counsel by letter that Carl A. Stone of Toronto, Ontario, Canada had been designated as its arbitrator. The record does not show that a third arbitrator has been selected by the arbitrators designated by the parties in this suit.

Upon this state of the record Surf moved to dismiss this appeal on the theory that the question before this court is now moot, and it alleges that the arbitration proceedings are now pending. Letters attached to the motion to dismiss support this contention. The motion was taken with the case. Participation in the arbitration proceedings is inconsistent with the theory of the appeal and constitutes an abandonment thereof.

Accordingly, we hold that the appeal from the order dismissing the complaint is now moot, and the appeal is therefore dismissed.

APPEAL DISMISSED.

BRYANT, J., and BURKE, J., concur.

ABST.



48685

SALLY SCIANNNA,) APPEAL FROM
Plaintiff-Appellant,) CIRCUIT COURT
v.) COOK COUNTY, ILLINOIS
THOMAS SCIANNNA,)
Defendant-Appellee.)

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Sally Scianna and Thomas Scianna were married at Chicago on January 7, 1939. They lived together until July 23, 1959. Two children were born of the marriage. On August 7, 1959 she filed a complaint for separate maintenance. He filed a counter-claim for divorce on the ground of wilful desertion. On October 25, 1960 a decree was entered severing the bonds of matrimony on the ground of wilful desertion by the wife.

On February 7, 1961 Mrs. Scianna filed a complaint at law against her former husband alleging that during the course of the pleading stage of the first case he indicated that he was in need of "some ready cash," proposed to sell "some property in Wisconsin" owned by them jointly "with a promise of making an equal division of the proceeds of the sale" of this property if she would agree to "sign a warranty deed." She charged that on or about September 11, 1959 her then husband "falsely and fraudulently represented" to her that he could dispose of the Wisconsin property for \$4,000 if she would sign away her interest in the property on his promise to pay her one-half of the proceeds or \$2,000; that believing the representations as to the \$4,000 to be true, and relying thereon she "did sign and return said warranty deed" to him, who in turn gave her \$2,000 as agreed;

that these representations by him were false, known by him to be false at the time they were made and were made with the intent to induce her to "sign away her interest" in the property and to deceive and defraud her; that he had no intention of equally dividing the proceeds of the sale, knew that he could sell the property for more than \$4,000 and sold the property for \$9,500.00, "but claimed" that he sold it for \$4,000; and did "under oath testify" that he received \$4,000 for the property and gave her \$2,000 as an equal division; and that he represented that he would give her one-half of any proceeds from the sale of the property. She prayed judgment for \$2,750.00 plus an additional amount as punitive damages, that the judgment find that malice is the gist of the action and that a capias ad satisfaciendum issue.

In answer to interrogatories she said that the facts concerning the alleged fraud first came to her knowledge on or about October 21, 1960, that the representations were made in writing by her former husband's attorney and agent and that they were adopted and ratified by him "orally and under oath on October 4, 1960." Defendant moved to dismiss the complaint on the ground that the decree entered on October 25, 1960 was res judicata as to the claim asserted. The motion was accompanied by an affidavit by defendant asserting that all the property rights of the parties were determined in the decree. A counter-affidavit made by one of the attorneys for plaintiff states that at no time while working on a settlement of the property rights in the divorce case was there any discussion by defendant or his attorney concerning the matters alleged in the instant case and that plaintiff was not then aware that a fraud had

been committed. The court sustained defendant's motion and dismissed the complaint. Plaintiff appeals.

She does not challenge the decree of October 25, 1960. She does not seek relief under the provisions of Section 72 of the Civil Practice Act. The alleged fraud was committed prior to the entry of that decree. Plaintiff admits in answering the interrogatories that she first acquired knowledge of the alleged fraud on October 21, 1960. It is apparent that she had knowledge of the alleged fraud at the time the decree was entered. She accepts the findings and provisions of the decree. Her position is that the decree does not affect her right to damages for the alleged fraud.

The decree found that each of the parties was fully acquainted with the wealth, assets and property of the other and entered into an oral agreement settling, adjusting and determining their respective property rights of every kind, nature and description. In the decree the court found that the parties made a fair and equitable settlement of their rights and approved the settlement. The chancellor found that upon the entry of the decree each of the parties be forever barred from asserting "any other rights of any kind, nature, or description" which he or she "claimed to have or may hereafter acquire" against the other "by virtue of the marital relationship" theretofore existing between them "or otherwise."

The decree in the divorce case was comprehensive. The parties made an oral agreement to settle all their property rights and "all other rights or claims." Pursuant to the agreement the decree forever barred each of the parties from



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asserting any claim against the other acquired by virtue of the marriage relationship "or otherwise."

The appellee is entitled to sustain the judgment by any argument and upon any basis appearing in the record which shows that the judgment is right, even if he had not previously advanced such argument. Becker v. Billings, 304 Ill. 190, 205.

We are satisfied that the decree in the divorce case decided the controversy presented in the instant case and constitutes an effectual bar to the action. Therefore the order is affirmed.

ORDER AFFIRMED.

FRIEND, P.J., and BRYANT, J., concur.



ABST.

48614



APPEAL FROM

(351.A.2377)

CIRCUIT COURT

COOK COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS)
on the relation of JOHN R. MASSEY,)
Plaintiff-Appellant,)
v.)
THE CITY OF CHICAGO, a municipal)
corporation, and ORLANDO W. WILSON,)
Superintendent of Police of the)
City of Chicago,)
Defendants-Appellees.)

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

On or before February 4, 1960 the petitioner was a regularly appointed and qualified acting policeman of the City of Chicago.

On February 4, 1960 he tendered his resignation in writing to the police department.

On February 8, 1960 the department of police in writing accepted his resignation, effective February 12, 1960, by the acting commissioner of police.

On February 11, 1960 there was received a withdrawal of his resignation, which gave a reason different than that first given when he resigned.

On February 12, he handed in his star and completed his resignation.

On February 15, the petitioner wrote the secretary of the Civil Service Commission requesting that his resignation be withdrawn.

On February 25, Mr. Massey was notified that the request to withdraw his resignation of February 6 and to be restored to his police duties was recommended to be disapproved.

On February 17, 1960 the Secretary of the Civil Service Commission was notified that the withdrawal of his resignation was not approved by the acting commissioner of police of the City of Chicago.

On or about July 15, 1960 Massey received notice that he was being recalled to duty and on August 28, 1960 he was instructed by telephone to report for duty within five days from that date, to wit, on September 1, 1960.

Through an error on August 12, 1960 the petitioner was sent a notice of reinstatement by the Civil Service Commission, and that such was an error is shown by the affidavit of Joanne Kelley.

On September 1, 1960 the petitioner was reinstated as a patrolman and assigned to the 40th District.

On September 22, 1960 the secretary of the police department wrote to the acting director of personnel stating that Massey should be removed from his position.

On September 28, 1960 the petitioner was dropped from the rolls as was directed by the Civil Service Commission on September 29, 1960.

Thereafter on the 21st day of November, 1960, he brought this suit for mandamus.

On July 20, 1961 the court entered an order in this case finding the issues in favor of the defendants, City of Chicago and Orlando W. Wilson, and that the plaintiff was not entitled to the writ of mandamus nor reimbursement for pay allegedly lost subsequent to September 29, 1960.

The petitioner Massey when he submitted his

resignation on February 4, 1960, placed it in the hands of his superior police officer and the Civil Service Commission to reject or accept it. They saw the reason that he gave in that letter: "The Civil Service expose of examination of Department members has made me feel that there is no chance of promotion," and the further reason given in his letter relating to his resignation dated February 10, 1960, and received by the Secretary of the Civil Service Commission on February 11, 1960: "Due to the death four months ago of my young eighteen month old boy I have not been able to adjust to his death. I feel I have acted emotionally rather than practically." The resignation was accepted on February 12, 1960 and that was the end of that employment under examination and after qualifying tests of the petitioner.

Rule 9, section 2 of the Civil Service Rules provides:

"Section 2. Resignation. A copy of the resignation of an officer or employee from the classified service shall be filed with the Commission by the head of the department receiving and accepting the same. The Commission may permit the withdrawal of a resignation and its cancellation upon application at any time within thirty days after the filing of same, provided, the head of the department concerned approves of such withdrawal and cancellation."

Once he was discharged and no longer a Civil Service employee his only means of qualifying for the job again was to take another Civil Service examination then have his name submitted in the regular course for appointment. That was not done here and we have at most an entirely unauthorized appointment and it was the duty of the Commission to correct its mistake in the most direct way possible, and that was done.

-4-

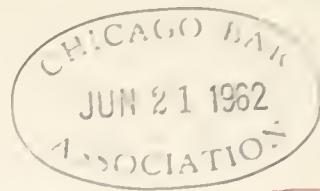
A person is not entitled to a writ of mandamus unless he shows a clear legal right to it. People ex rel. White v. Hurley, 1 Ill. App.2d 442.

The order is affirmed.

ORDER AFFIRMED.

FRIEND, P.J., and BURKE, J., concur.

ABST.



48615

ROBERT J. ATWATER,)
Plaintiff-Appellee,)
v.)
DAISY PEARL ATWATER,)
Defendant-Appellant.)

APPEAL FROM THE
SUPERIOR COURT
OF COOK COUNTY.

(35 I.A. 1382)

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

Robert J. Atwater brought this suit for divorce on the ground of adultery. His wife, the appellant Daisy Pearl Atwater, answered his complaint and denied the adultery. She also filed a countercomplaint for divorce on the ground of cruelty.

According to the appellant's brief and abstract this appeal is from two orders entered by the trial court. One was dated May 29, 1961, and is an order for a rule to show cause returnable on June 9, 1961, against Mrs. Atwater for her failure to sign articles of agreement for the sale of property held in the names of both parties. The second, dated June 7, 1961, was for a writ of attachment directing the sheriff to bring her before the court to purge herself of contempt for not having complied with the prior order of the court.

The principal points argued by the appellant are that the court had no jurisdiction to enter these orders because (a) neither party had asserted a claim or interest in the property which was the subject of the orders or had prayed for any relief relating thereto; (b) the order of May 29th failed to identify or delineate the order which the appellant was accused of disobeying; (c) the order of May 29th provided for the rule to show cause to be returnable on June 9, 1961,

but the order for the attachment was entered on June 7th, two days before she was required to appear.

The order, upon which the order of May 29th was predicated, is not in the abstract nor the record. The appellant is guilty of the same omission, urged by her as error in point (b), above. Without this order it would be impossible for us to determine the merit of the appellant's argument even if we were in a position to do so. We are not in such a position because neither of the orders set out in the brief and abstract are final or reviewable.

The order of May 29, 1961, was for a rule to show cause. It is not a final order in any sense and is not appealable. Themar v. Themar, 28 Ill. App. 2d 138, 171 N.E.2d 104; Themar v. Themar, 31 Ill. App. 2d 39, 175 N.E.2d 644.

The order of June 7, 1961, was for an attachment for Mrs. Atwater for her failure to comply with an order of the court. This also is a preliminary order. It does not find her guilty of contempt and does not punish her for contempt. The attachment was to bring her into court so that it could be determined if she was in contempt. As this court said in Buland v. Buland, 23 Ill. App. 2d 299, 162 N.E.2d 585:

"No order was entered finding plaintiff guilty of contempt and imposing a penalty. These are the final steps in a contempt proceeding, from which an appeal may be taken. What occurs before these final steps is interlocutory and not appealable. Flanigan v. Flanigan, 331 Ill. App. 418, 73 N.E.2d 652 (1947); McEwen v. McEwen, 55 Ill. App. 340 (1894)."

The appellee did not appear in this court and did not file a brief. Since he was not represented we examined the

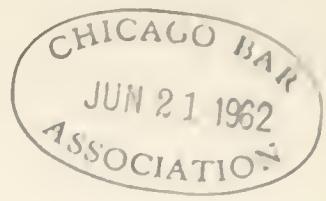
full record to ascertain the reasons for the trial court's ruling and to find support for its orders. Richman Chemical Co. v. Lowenthal, 16 Ill. App. 2d 568, 149 N.E.2d 351; McGovern v. City of Chicago, 202 Ill. App. 139. Our inspection brought to light the following peculiarities: (1) the notice of appeal was from an order entered on June 20, 1961, and not from the orders of May 29th and June 7th, as represented in the appellant's brief; (2) the order of June 20th is in the record but no reference is made to it in either the abstract or brief; (3) the praecipe requested that the order of June 20th be included in the record, but it did not ask for the orders of May 29th and June 7th; (4) the order of May 29th has been inserted in the record without the court clerk's certification; (5) the order of June 7th is not in the record although it is set out in the abstract, and (6) there is no order in the record directing Mrs. Atwater to sign articles of agreement for the sale of property; in fact, there is no order dated before May 29, 1961. In view of these flagrant omissions, additions and misrepresentations we would be justified in striking the abstract and in dismissing the appeal. Gage v. City of Chicago, 211 Ill. 109, 77 N. E. 877; Campbell v. Fazio, 23 Ill. App. 2d 106, 161 N.E.2d 579.

There is no obligation on our part to supply the deficiencies of the abstract or to reconstruct the appellant's appeal. The judgment of the Superior Court must be affirmed.

Affirmed.

McCormick, P.J., and Schwartz, J., concur.

APRST



48444

JOHN D. VOSNOS,)
Appellee,)
v.)
GEORGE WENZEL and ELIZABETH)
WENZEL,)
Appellants.)

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal was taken from an order of the Municipal Court of Chicago denying the petition of George Wenzel and Elizabeth Wenzel, his wife, (hereinafter referred to as defendants), filed under section 72 of rule 1 of the Municipal Court, which is substantially the same as section 72 of the Practice Act, to vacate a default judgment against them and in favor of the plaintiff, John Vosnos, in the sum of \$1,500, and from an order dismissing defendants' counterclaim against Vosnos.

Statement of claim was filed in the Municipal Court by the plaintiff. Answer was filed by the defendants. Defendants with their defense filed a counterclaim. On June 27, 1960 the court entered judgment on the verdict rendered by a jury in an ex parte hearing finding for the plaintiff and against the defendants, and dismissed the defendants' counterclaim. On September 29, 1960 the defendants filed a verified petition asking to have the judgment and order dismissing the counterclaim vacated. This petition was answered by the plaintiff. On January 6, 1961 the trial judge entered the following order:

"Now comes the defendants herein and by petition move the Court to vacate the Ex Parte Judgment and the Court being fully advised in the premises, overruled said motion, and

"It is further ordered by the Court that leave be and the same is hereby given defendants to file an Amended Petition within THIRTY DAYS AND THAT Plaintiff's Answer be and the same is hereby allowed to stand to Amended Petition to be filed."

On January 31, 1961 the defendants filed their notice of appeal.

After oral argument a motion was made by the plaintiff to dismiss the appeal on the ground that it was not an appeal from a final order.

Our courts have repeatedly held that an appeal can only be taken from a final order of the trial court, and section 77 of the Practice Act so provides. In Roddy v. Armitage-Hamlin Corp., 401 Ill. 605, 609, 83 N.E.2d 308, 311, the court says:

"A final order has been variously defined. In general, to be final and appealable, an order or decree must terminate the litigation between the parties on the merits of the cause, so that, if affirmed on review, the trial court has only to proceed with the execution of the order or decree. (Rogers v. Barton, 375 Ill. 611; Free v. The Successful Merchant, 342 Ill. 27.) * * * Approaching the problem from another viewpoint, a decree retaining jurisdiction for future determination of matters of substantial controversy between the parties is not final * * *."

See People v. Stony Island Sav. Bank, 355 Ill. 401, 189 N.E. 267. In Rettig v. Zander, 364 Ill. 112, 4 N.E.2d 30, the court states that a decree is said to be final when it terminates the litigation between the parties on the merits and fully decides and finally disposes of the rights of the parties to the cause, citing cases. In Goodloe v. City of Richmond, 278 Ky. 794,

129 S.W.2d 563, the court states: "A final judgment or order from which an appeal lies either terminates the action itself or operates to divest some right in such manner as to put it out of the power of the court making the order after the expiration of the term to place the parties in their original condition." In American Broadcasting Co. v. Wahl Co., 121 F.2d 412 (2nd Cir.), the court holds that when a cause of action has been dismissed with leave to amend, the order was not final.

In the instant case, when the court entered the order denying defendants' petition to vacate the judgment, it was not a final order since permission was given to the defendants to amend their petition. Such an order of necessity contemplates and requires another order denying defendants' petition even in case the defendants fail to file any amendment. Western Electric Co. v. Pacent Reproducer Corporation, 37 F.2d 14 (2nd Cir.).

In the case before us the defendants filed their notice of appeal in the trial court during the period within which they had a right under the order of the court to file an amended petition. Appeals will not be permitted from a judgment or order of a court which does not absolutely settle the rights of the parties. The appeal must be dismissed.

Appeal dismissed.

Dempsey and Schwartz, JJ., concur.

STATE OF ILLINOIS

APPELLATE COURT

(35. I.A. 2399)

THIRD

AT AN APPELLATE COURT, for the ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, Presiding JudgeHONORABLE C. ROSS REYNOLDS, JudgeHONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 16th day
of MAY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10396

Kenneth Theetge,

Plaintiff-Appellant,

vs.

John L. Williams,

Defendant,

Indemnity Insurance Company of North America,

Third Party Defendant,
Appellee.

Agenda No. 14

~~FILED~~

MAY 16 1952

Robert L. Conn, CLERK
APPELLATE COURT 3rd DIST.

Appeal from the
Circuit Court of
Champaign County

CARROLL, J.

This is a supplementary proceeding brought against the Indemnity Insurance Company of North America arising out of a default judgment obtained by plaintiff against defendant, John Williams, for damages sustained as a result of injuries received in an automobile accident.

Hearing was had before the court without a jury upon the citation directed to Indemnity, its answer thereto and plaintiff's reply denying certain affirmative defenses raised by the third party defendant. At the conclusion of the hearing, the trial court entered judgment in favor of the third party defendant and against the plaintiff. The plaintiff appeals from this adverse judgment.

In urging reversal the plaintiff contends that the insurance company, third party defendant, failed to sustain its burden of proof with respect to the affirmative defenses set up as a defense to plaintiff's citation, and that, therefore, the judgment below is erroneous.

On December 24, 1957, third party defendant, Indemnity Insurance Company of North America, insured one Earl Meese under a standard automobile casualty policy which covered a 1949 Plymouth automobile owned by said Earl Meese. The policy defined as "Insureds" the following:

(1) The named insured and any resident of the same household.

(2) Any other person using such automobile, provided the actual use thereof is with the permission of the named insured.

The policy also contained the following conditions:

3. Notice

In the event of an accident or occurrence written notice containing particulars sufficient to identify the insured and also reasonable obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

5. Assistance and Cooperation of the Insured Part I

The insured shall cooperate with the company and, upon the company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in

the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

On the date of the occurrence in which plaintiff was injured, the named insured was stationed at the Chanute Air Force Base at Rantoul, Illinois. One John L. Williams, a comrade, also stationed at Chanute, requested permission from Meese to use his automobile to go into the city of Rantoul on an errand for a friend. Meese consented to Williams' using the car and gave the latter the keys. Williams took the insured car from a nearby parking lot, drove to Rantoul, completed his business and returned the automobile to the same parking lot from which he removed it. After parking the car, Williams went to Meese's room to return the keys, but Meese was not there so Williams retained the keys and after a short visit with a friend on the base, returned to the automobile and drove it towards Champaign, Illinois. On leaving the Air Base, Williams picked up the plaintiff, Kenneth Theetge, and enroute to Champaign the automobile left the road, overturned and plaintiff sustained personal injuries.

On July 7, 1958, plaintiff's attorney gave notice of the occurrence to the third party insurance company. On receipt of this notice the insurance company dispatched an adjuster who conferred with the attorney and who also corresponded with him in an attempt to locate the driver of their insured's automobile. Eventually a

new address for Williams was obtained which was in South Carolina but the company was unable to locate him. On March 11, 1959, the company wrote Williams at an APO address informing him of a claim under their insured's policy, requesting his cooperation and informing him that coverage would be denied upon the information then in the hands of the insurance company. This letter was not returned to the insurance company nor was any response elicited from Williams.

On August 26, 1959, the plaintiff filed his suit against Williams and on the day following plaintiff's attorney sent a letter to Williams informing him of the filing of the suit. A carbon copy of this letter was forwarded to the defendant insurance company.

On March 8, 1960, the defendant, Williams, was personally served in Cleveland, Ohio. Williams did not forward the summons to the insurance company nor did he otherwise notify the company of the service obtained upon him. On July 18, 1960, judgment upon defendant's default was entered in favor of the plaintiff in the sum of \$10,000.

On August 5, 1960, the plaintiff served a notice upon the insurance company defendant of the taking of the deposition of defendant Williams. Thereafter on November 15, 1960, these supplementary proceedings were initiated against Indemnity Insurance Company of North America. The company filed an answer denying liability under its policy on the following grounds.

1. That the driver of the insured's automobile, John L. Williams, did not qualify as an additional insured because the

automobile was not being operated with the permission of the named insured, Earl Meese.

2. That the driver and principal defendant, John L. Williams, did not comply with the conditions imposed by the policy in that he failed to forward the summons and failed to cooperate with the third party insurance company defendant. Defendant's reply denied the matters alleged by way of affirmative defense.

There is no question but that the burden was upon the third party defendant to sustain by a greater weight of the evidence the affirmative defenses set up in avoidance of its insurance contract liability. If there is sufficient evidence to sustain the result below on either of the affirmative propositions alleged by the third party defendant, the judgment must be affirmed.

With respect to the question of permission, the plaintiff urges that the express permission given to Williams by the named insured continued to the time of the collision notwithstanding the fact that the automobile had been returned to the parking lot on the Air Base. Plaintiff's theory is that the retaking of the automobile by Williams constituted a mere deviation. The defendant on the other hand, contends that the permission by its named insured was for a particular limited purpose, that is, the original journey to Rantoul for a specific errand, and that when the automobile was returned to the parking lot the purpose of the permissive use had been totally accomplished and that the possession and permission by the user would be considered as effectively terminated. It should be noted that the request and granting of permission was casual in this case, as

would be expected. The named insured owner merely handed the keys over to the defendant Williams. When Williams returned from Rantoul, he was unable to locate the owner, kept the keys and within a very short time thereafter again took the automobile. Having parked the automobile according to his own whim and having retained custody of the keys to the automobile, we are not inclined to accept the third party defendant's view that possession had been relinquished and the permission effectively terminated. We only mention this in passing as we do not find it necessary to decide such question in disposing of this appeal. In our view the more compelling feature of this case concerns the matter of cooperation and Williams' failure to forward summons or to notify the insurer of the personal service obtained upon him.

Assuming that the permission granted Williams was broad enough to cover his use of the car at the time of the automobile upset and further assuming that in all other respects Williams qualified as an additional insured, under the terms of the policy, we must determine whether the evidence sustains the third party defendant's contention that Williams did not comply with certain policy conditions set forth above. It should be noted here that plaintiff does not urge that the judgment is against the manifest weight of the evidence. It appears rather that plaintiff suggests either that the affirmative defenses claimed by the third party defendant are not available as a matter of law in this case or in the alternative that such defenses,

even if available, were waived by the third party defendant. The evidence with respect to the notice of suit and the cooperation or lack thereof by Williams shows that following the accident Williams was taken to a police station in Champaign and was brought back to the Air Base by the Air Force Police. Upon returning Williams told the named insured, Meese, about the accident. Some weeks later Williams received a phone call or a letter from plaintiffs attorney and did pay a visit to the attorney's office. Plaintiff's attorney informed the third party defendant of the occurrence and subsequently an adjuster from the company called upon the attorney to obtain details concerning the claim and this adjuster testified that following his conference with plaintiff's attorney he went to the Air Base and attempted to locate the named insured and driver Williams. He was unable to locate either because they had been reassigned. Sometime later plaintiff's attorney provided the third party defendant with an APO address in North Carolina. An attempt was made by the company to locate Williams at his new Base, but again he was not to be found. The company then wrote to Williams at his APO address and informed him in this letter that a claim had been made by plaintiff and that he might qualify as an additional insured. The letter also requested information and cooperation by Williams. It also cautioned him that he might be deprived of coverage if he failed to cooperate in the investigation and defense of the claim. This letter was not returned and it was presumed to have been delivered to Williams. It did not,

however, elicit any response. The first notice of the entry of the default judgment against Williams was received by the company on October 15, 1960, when plaintiff's attorney gave notice to the company of the taking of Williams' deposition for evidence. Williams, by way of evidence deposition testified that he did receive a copy of the complaint and summons but he made no report to anyone about receiving same and likely threw it away. He testified he did not notify the third party defendant that he had been served nor did he forward the copy of summons and complaint to it. Following the taking of Williams' evidence deposition, these supplementary proceedings were instituted.

We are satisfied that the evidence fairly tends to establish that Williams did not forward summons or notice of suit nor did he cooperate as clearly defined by the terms of the policy. The only considerations that remain are whether such non-compliance by Williams excused the company from liability and whether or not the company may have waived the defenses it now claims. There is no conflict in the evidence with respect to Williams failing to forward summons or to otherwise notify the defendant of such service upon him. The evidence further shows that this defendant did not learn of the litigation until after default judgment had been taken. While notice of the occurrence was provided by plaintiff's attorney, the evidence is clear that Williams made no attempt to notify the insurance company of the accident.

We have examined carefully the authorities cited by plaintiff and third party defendant with respect to the obligations of the insurer and one claiming the benefits of coverage. We refer to Muthart for use of Zitnik v. Burik, 327 Ill. App. 170; Simmon v. Iowa Mutual Casualty Co. 3, Ill. 2d 318; Gregory v. Highway Insurance Company 24 Ill. App. 2d, 285; Allstate Insurance Company v. Keller, 17 Ill. App. 2d, 44; Krutsinger v. Illinois Casualty Company 10 Ill. 2d, 518, and others. While the cases mentioned and others cited in the briefs of both parties are authority on such question, we feel that the subject as involved here can be disposed of by considering one limited phase of the affirmative matters raised by the third party defendant. We do not think it necessary to rule upon the precise question of whether or not the mere failure of Williams under the circumstances existing to forward summons and complaint constitute such a breach as to relieve the insurance company of its liability under the extended coverage provisions. We think such failure is but one fact to be considered with other facts in evidence as reflecting the total lack of cooperation by Williams. Not only did Williams fail to notify the insurance company of the occurrence, he failed to respond to written inquiry on the part of the company and he failed as well to notify the company of the pending suit or to forward summons and complaint. It would seem that the plaintiff's position is that an insurance company is bound by whatever information is furnished to it by a claimant's attorney; and, even though the company was deprived of prompt notice of the accident as well as the filing

of suit, it must respond following default judgment notwithstanding the fact that reasonable efforts to locate the additional assured were of no avail. This view seems to us to be particularly harsh and untenable against defendant. We do not mean to infer that under the present circumstances mere failure to forward summons and complaint is necessarily adequate to excuse the insurance company's liability. It is, however, a pertinent and material fact to be considered with the other facts referred to above in determining whether or not the defense of lack of cooperation was available to the insured. We are aware of the decision in Growth v. Standard Accident Insurance Company, 267 F 2d, 399, with respect to the failure to forward summons as not providing the insurer with a defense where the insured himself did not receive summons. Nevertheless, it is inconceivable that a third party indemnifier be held liable where the evidence shows the defendant in chief not only failed to notify the third party of the claim and the suit, but also neglected to respond to inquiry or to make himself available for investigation and defense in spite of efforts on the part of the third party insurer. Under the authority cited and under the plain meaning of the insurance contract it would be the additional insured's obligation to cooperate. We are of the opinion, therefore, that the evidence and the law support the trial court's judgment in that Williams did not comply with the condition of the policy requiring his cooperation.

The next question presented is whether or not the third party defendant waived its defense of lack of cooperation on the part

of Williams. It is, of course, a question of fact as to whether an insured was lulled into a false sense of security by the conduct of an insurer, but it is a question of law as to whether such facts exist in this case. Aetna Life Insurance Company v. Sanford, 200 Ill. 126; Old Colony Life Insurance Company v. Hickman, 315 Ill. 304. The facts in the instant case disclose no representation of any sort on the part of the third party defendant that it was affording protection to Williams. It is our view that the contrary is reflected by the evidence. Having failed to locate Williams by personal calls, the company forwarded correspondence in which it set out the possibility of its affording coverage but such correspondence also forwarned Williams that the coverage was conditioned upon his co-operation, etc. To this Williams made no reply. Upon receipt of summons and complaint, Williams totally failed to forward or notify the company and as he testified in his evidence deposition, he threw the papers away. It should be pointed out that these facts came to light sometime after the default judgment had been taken against Williams. The plaintiff also urges that the company waived its defense by failing to promptly disclaim. We think it is obvious that it had insufficient facts upon which to base either acceptance or disclaimer of coverage. Aside from a fragmentary report from its named insured and such information as was received from plaintiff's attorney, defendant was ignorant of any claim against Williams and was hardly in a position to consider the question of coverage until the plaintiff sought to enforce its judgment by the supplementary proceedings. As

a matter of elementary justice we must observe that the plaintiff sought Williams' deposition only after it had obtained judgment against him. The plaintiff could very well have obtained such deposition in the suit in chief rather than as an aid to its citation proceedings against the defendant. While the defendant attended the deposition, it had previously been deprived of all opportunity to investigate and defend the personal injury action. Such deprivation was entirely owing to the default of the additional insured, Williams.

We hold that under the circumstances disclosed by the record, the insurer third party defendant was entitled to defend upon the ground of lack of cooperation without prior disclaimer of liability or reservation of rights. We also find that the evidence fails to reflect facts constituting a waiver and, therefore, waiver as a matter of law is not before this court.

For the reasons indicated herein, the judgment of the Circuit Court of Champaign County is affirmed.

Affirmed.

ROETH, P. J. and REYNOLDS, J., concur.



1st DIVISION

Abstract

NO. 11589

Publish Abstract only.

Agenda 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A.D. 1962

(35 I.A. 2d 400)

MORRIS S. KAPLAN and
LUCILLE KAPLAN,

Plaintiffs-Appellants,
vs.

INTERSTATE FIRE & CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the
Circuit Court,
Lake County.

McNEAL, J.:

This is an action to recover damages under the "collapse" provision of a standard fire insurance policy issued by the defendant Interstate Fire & Casualty Company. Trial was had before the court without a jury. The court entered judgment for the defendant company, and this appeal followed.

The policy insured the plaintiffs, Morris S. Kaplan and Lucille Kaplan, for the period October 7, 1958 to October 7, 1961. One of the perils insured against reads as follows:

"Collapse of Building(s) or any part thereof, but excluding: (a) the first \$50 of loss (computed separately for each occurrence); (b) loss caused directly or indirectly by subsidence; and (c) to outdoor equipment, fences, driveways, walks or retaining walls and bulkheads not constituting part of a building covered."

Morris S. Kaplan testified that plaintiffs purchased a new home in June of 1955. In November of 1959 he noticed that an area of the roof about ten by fifteen feet had settled about three or four inches. Later he noticed that the soffit and drains were out of line, and a beam holding the rafters was at an angle. An architect testified on behalf of plaintiff that the roof had sunk an inch and a half to two inches over an area of about eight or ten feet by fifteen feet, that the rafters were dropping from the ridge board and that the soffit and gutters were

damaged. It was his opinion that the roof was constructed improperly and that if the roof were not replaced it was possible that it could collapse.

On behalf of the defense an architect testified that the roof was concave over an area of nine by fifteen feet, that by actual measurement the maximum depression was two and a quarter inches, that the depression was caused by excessive shrinking in the drying process of the rafters, and that there was no indication of structural weakness of the roof. He testified that the load-bearing capacity of the roof was forty-five pounds per square foot and that the minimum required for the type of construction was twenty-five pounds per square foot. He stated that the condition had reached a permanent condition and that there would be no increase in the depression.

Based upon the foregoing evidence the trial court found that there had not been a collapse of the building or any part thereof within the meaning of the policy. We would not be justified in setting aside this finding unless it is manifestly against the weight of the evidence, i.e. unless it is clear, plain and indisputable that the trial court's conclusion is wrong. Rude v. Seibert, 22 Ill. App. 2d 477, 483.

In Teutonia Ins. Co. v. Bonner, 81 Ill. App. 231, 236, a fire insurance policy provided that if the building fell, except as a result of fire, all insurance should immediately cease. The insured house was blown over by wind and destroyed by fire. In affirming a judgment entered upon a verdict against the insurance company, the Court quoted from Joyce on Insurance to the effect that a fallen building is one which has lost its distinctive character as the building insured, and pointed out that text authorities indicate that a fallen building is one which has "collapsed" or become a "mere ruin", "mass of rubbish", or "congeries of material", or "could not be repaired and still be the same building".

In Rubenstein v. Fireman's Fund Ins. Co., 339 Ill. App. 404,

409, suit was brought on a policy for damage caused by "collapse of building" or "other similar casualty". Plaintiff's property was damaged when a portion of the dining room ceiling comprising an area of 36 square feet collapsed and fell upon plaintiff's property. In affirming a judgment against plaintiff, the Court referred to cases holding that "collapse of building" means that the entire building must lose its distinctive character as a building, and also cited Teutonia Ins. Co. v. Bonner, 81 Ill. App. 231.

The question involved in this case is covered by an annotation in 72 ALR 2d 1287, in which the author concludes that in order to come within coverage for collapse of a building, the building must lose its distinctive character as a building.

In Central Mutual Ins. Co. v. Royal, 269 Ala. 372, 113 So. 2d 680, 72 ALR 2d 1283, 1286, preceding the annotation, recovery was sought under a provision covering "collapse of building or any part thereof." The evidence showed that the walls and foundation of the insured house had cracked. In reversing a judgment on a verdict against the insurer, the Alabama Supreme Court quoted from the decisions of our Appellate Court in the Teutonia and Rubinstein cases, and said:

"In 2 Words and Phrases, First Series, page 1248, it is said: 'Webster defines "collapse" thus: 'To fall together suddenly, as the two sides of a hollow vessel; to close by falling or shrinking together; to shrink up, as a tube in a steam boiler collapses.' ... The Century Dictionary defines "collapse" thus: 'To fall together, or into an irregular mass or flattened form, through the loss of firm connection or rigidity and support of the parts or loss of the contents, as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it.'

"In 14 CJS p. 1316, the word 'collapse' is defined as follows: 'To break down or fail abruptly and utterly, to cave in; to close by falling or shrinking together, to fall together, or into an irregular mass or flattened form, through loss of firm connection or rigidity and support of the parts or loss of the contents, as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it, or to fall together suddenly, as the two sides of a hollow vessel; to go to pieces; and to shrink up, as a tube in a steam boiler collapses.'"

In several of the decisions discussed in the ALR annotation,

courts of other jurisdictions have applied a rule that there has been a "collapse" where the substantial integrity of the building has been impaired to such an extent as to render it uninhabitable, or where the basic structure has been materially impaired. Even if we were to apply such a rule in this case, we would not be justified in setting aside the judgment of the trial court, because there was a conflict in the evidence on this point. The architect who testified for the owners stated that it was possible that the roof would collapse if it were not repaired, whereas the architect for the insurance company testified that there was no interference with the structural support of the roof and that its load-bearing capacity was well above the minimum requirements. Where the proof conflicts, the determination made by the trial judge will not be disturbed unless such determination is clearly or palpably against and contrary to the manifest weight of the evidence.

Kater v. United Ins. Co. of America, 25 Ill. App. 2d 22, 34.

In view of the evidence in this case and the foregoing authorities we cannot say that the finding of the trial judge was manifestly wrong. Accordingly it is our conclusion that the judgment of the circuit court of Lake County should be and it is affirmed.

Affirmed.

DOVE, P.J., and SMITH, J., concur.



ABST.

48518

BARBARA MOWERY,)
Appellee,)
v.)
LEO KARAS,)
Appellant.)

)
APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

CHICAGO BAR
JUN 21 1962
ASSOCIATION

35 I.A. 406

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The plaintiff, Barbara Mowery, brought an action against Leo Karas under the Paternity Act (Ill. Rev. Stat. 1959, chap. 106-3/4, pars. 51 to 66). In the complaint the plaintiff alleged that she is the mother, and the defendant is the father, of a male child born out of wedlock on October 3, 1959. The answer denies that the defendant is the father of the child. The case was tried before a jury, and the jury on July 25, 1960 returned a verdict finding that the defendant was the father of the child. The trial court entered an order on December 28, 1960 finding the net income of the defendant to be a certain amount and ordering the defendant to pay certain sums of money instanter for expenses of pregnancy, confinement, etc., and to pay \$448 immediately for child support from October 3, 1959 to December 27, 1960, and a further additional sum each week until the further order of the court. The defendant filed a notice of appeal, and in his brief argues that there was error in the trial of the case before the jury in the admission of evidence, that the verdict is against the manifest weight of the evidence, and that the trial court erred in not entering a judgment notwithstanding the verdict.

It is elementary that the right of appeal is given by statute. This court has no inherent right to entertain an

appeal. 2 I.L.P. Appeal and Error, sec. 21; Ward v. People, 13 Ill. 635. Section 77 of the Civil Practice Act (Ill. Rev. Stat., 1959, chap. 110, par. 77) provides that appeals shall lie to review the final judgments, orders or decrees of certain enumerated courts. Before the Appellate Court can take jurisdiction of an appeal there must have been a judgment entered in the trial court, and the judgment from which the appeal is taken and its rendition and entry must be shown by the record.

Appellate Court rule 6 provides that the party prosecuting an appeal shall furnish the court an abstract of the record on appeal sufficient to present fully every error relied upon. Where the party fails to present such an abstract this court should either affirm the judgment or dismiss the appeal (Harris v. Annunzio, 411 Ill. 124, 103 N.E.2d 477), and, in Boston Store v. Industrial Com., 386 Ill. 17, 53 N.E.2d 455, it was said that it had been stated repeatedly that the court will not search the record to supply deficiencies in the abstract.

Section 9 of the Paternity Act (chap. 106-3/4, par. 59) provides that if on the trial of the issue of paternity the jury finds that defendant is the father of the child, the court shall enter judgment to that effect. It further provides that the court, after such judgment has been entered, shall take evidence on the requirements of the child for its support, the expenses of the mother during pregnancy, etc., and shall enter an order with respect thereto, and that the court shall retain jurisdiction of the case etc. Here, the only thing that appears in the record with respect to the issue of paternity is a verdict of the jury finding the defendant to have been the

father of the child. The abstract shows no judgment upon that verdict, nor does such judgment appear in the record. The notice of appeal is referred to in the abstract but is not set out in full. The notice of appeal in the record indicates the appeal is from an order entered in the cause on February 27, 1961 denying the post-trial motion and fixing a weekly payment to the plaintiff in the sum of \$7.00. That order is referred to in the abstract. There is also another order, entered on December 28, 1960, which appears both in the record and in the abstract. That is the order which we have previously set out and which the defendant states in his brief is the order from which the appeal is taken. This statement is in direct conflict with the notice of appeal. However, in any case we have no jurisdiction to consider the appeal. In Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N.E. 473, an appeal was taken from the Appellate Court to the Supreme Court. Neither party raised any question as to the jurisdiction of the Appellate Court but submitted the cause to the Supreme Court on the merits. In the opinion of the Appellate Court attention was called to the fact that the judgment was not final, but the court treated it as final and disposed of the case on the merits and affirmed the judgment. The Supreme Court held that the judgment was not final and the statute only authorizes appeals from final judgments. The court discusses the question of whether the appellant, by taking the appeal, was estopped from questioning the jurisdiction of the Appellate Court. The court says:



"If a court, on appeal, has jurisdiction of the subject matter and of the parties, any objection to the manner in which it reaches the court will be waived by the parties appearing and pleading without objection. (Lynn v. Lynn, 160 Ill. 307.) But where the court has no jurisdiction of the subject matter, the jurisdiction cannot be conferred by agreement of parties and the want of jurisdiction cannot be waived by failing to object. (2 Cyc. 536.) * * * It is not competent for parties to confer jurisdiction of the subject matter upon an appellate court by their stipulation. (Westcott v. Kinney, 120 Ill. 564.) In this case the Appellate Court had no jurisdiction of the subject matter, not being authorized by law to hear or consider an appeal from a judgment which is not final, and appellant is not legally estopped to set up a want of jurisdiction. A court finding it has no jurisdiction of a cause should dismiss it of its own motion, and the Appellate Court should have dismissed the appeal at appellant's cost."

Also see People v. O' Hair, 340 Ill. 206, 172 N.E. 45, and Department of Finance v. Bode, 376 Ill. 374, 33 N.E.2d 586. In Hayes v. Industrial Commission, 383 Ill. 272, 48 N.E.2d 940, a case quite similar to the case before us, the court stated, citing authorities, that the court will not search the record to supply deficiencies in the abstract. However in that case the court did search the record and found no judgment in the record. The court dismissed the writ of error.

The appeal from the order of the Superior Court of Cook County must be, and is, dismissed.

Appeal dismissed.

Dempsey and Schwartz, JJ., concur.

ABST

WILLIE LEE McFADDEN, a minor, by
his mother and next best friend,
IRENE McFADDEN,
Plaintiff-Appellant,
vs.
WILLIAM B. WERNECKE,
Defendant-Appellee.

35 T.A. 2441



APPEAL FROM THE
MUNICIPAL COURT
OF CHICAGO

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

On petition of defendant under Section 72 of the Civil Practice Rules of the Municipal Court of Chicago* the trial court vacated its previous judgment against defendant and quashed the service of summons. From this order plaintiff appeals.

The Statement of Claim, filed May 17, 1957, alleged injury to plaintiff caused by negligence of defendant in the maintenance of a building owned by him. Original summons and three alias writs were returned "not found." A fifth writ was issued directing service at Cook County Jail and it was returned by the bailiff showing personal service on defendant October 20, 1959.

On October 27, 1959, the return day of the writ, defendant's attorney filed a document entering "the special and limited appearance of the defendant for the sole and exclusive purpose of challenging the jurisdiction of this court over the person of the defendant, and moving to quash the return of the alleged service of summons upon the defendant and my appearance as his attorney."

* This rule is essentially the same as Section 72 of the Civil Practice Act (Ill. Rev. Stat., Ch. 110, § 72).



Neither defendant nor his attorney pursued the questions raised by this document, and, after various continuances, the court, on December 22, 1959, ordered that the special appearance be stricken and stand as a general appearance. Defendant was also given fifteen days to file answer. No answer was ever filed.

Both parties have treated the "special appearance" document as having been sufficient, in itself, to present to the court a motion on behalf of defendant to quash service of summons. They have also considered that the order of December 22, 1959, striking the special appearance, had the effect of overruling such motion. We shall accept their interpretation of these matters.*

On February 5, 1960, notice was served on both defendant and his attorney that on February 10 plaintiff would move the court to default defendant for failure to answer and would ask the court to set a date for the prove-up of plaintiff's claim.

On February 10, plaintiff's motion for default was entered and continued to March 15, and (as appears from a subsequent pleading) defendant was so advised.

No order was entered on March 15. On April 26, 1960, without the service of any further notice, and without there having been any order of continuance to that date, the court, ex parte, entered an order allowing plaintiff's motion for default, proceeded to hear evidence, and entered a judgment against defendant for \$5,000.

* Section 20 of the Civil Practice Act governs special appearances and it gives no authority to the court to strike a special appearance or to order it to stand as a general appearance. (Ill. Rev. Stat., Ch. 110, § 20.)



More than thirty days later, defendant learned of the entry of the judgment against him through the service of a garnishment summons. Within a reasonable time thereafter, on July 14, 1960, defendant filed his Section 72 petition setting forth, among others, the facts above recited, and asking that the judgment be vacated and service quashed, primarily on the ground that there had been no proper service of summons upon defendant.

After a hearing at which testimony was taken, the petition was allowed and the order was entered from which plaintiff has taken this appeal.

It appears from that order that the judge based his conclusion on a failure of proper service of summons. In our present consideration of the correctness of the order, however, we would not be limited to any particular reason for its entry if, for any reason whatsoever, we were to believe, as we do, that the facts in the record and the applicable law required the court to enter the order it did, vacating the previous judgment. (Merriam v. McConnell, 31 Ill. App. 2d 241, 244; Becker v. Billings, 304 Ill. 190, 205; National Gas & Oil Co. v. Rizer, 20 Ill. App. 2d 332, 335-336.)

Plaintiff's motion for default and judgment had been presented to the court on February 10, 1960 after proper service of notice on defendant as demanded by Rule 3, Section 1.1 of the Municipal Court of Chicago. This rule broadly provides that "Notice of all proceedings in an action shall be given to all parties who have appeared."

The order of February 10 continuing the motion to March 15 had the effect of preserving the notice as though it had



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originally been given for appearance in court on the latter date. On March 15, however, when no order of continuance was entered, the validity of the original notice terminated. No further notice was ever given. Consequently, when default and judgment were entered against defendant on April 26, it was the same as though no notice had ever been served, and there was a complete failure of compliance with the important rule above quoted.

Such a lack of notice has repeatedly been held to be the kind of procedural defect which can be reached by a petition under Section 72. See Moore v. Jones, 12 Ill. App. 2^d 488, '95, Josten Manufacturing Co. v. Keeler, 284 Ill. App. 646; Swiercz v. Nalepka, 259 Ill. App. 262, 267; Risedorf v. Fyfe, 250 Ill. App. 122, 126. In each of these cases it was held that the absence of notice required by court rule was a question of fact which would have prevented entry of default and judgment, had it been brought to the knowledge of the court. Under these circumstances, relief sought through a Section 72 petition was held to be appropriate and fully justified when diligently filed, as in the case at bar. We, therefore, believe that the portion of the order appealed from which vacated the default and judgment, was properly entered and should be affirmed.

As to the portion of the order which quashed the service of summons, quite a different question is presented. This had the effect of setting aside the trial court's own determination of defendant's motion to quash which had been denied December 22, 1959, some seven months before the filing of the Section 72 petition.



Assuming the law to be that a bailiff's return of service of summons may be contradicted by a petition under Section 72 in a proper case (Tomaszewski v. George, 1 Ill. App. 2d 22, 27), we do not consider this a proper case. As early as October 1959 defendant and his attorney who appeared for him knew of the summons' return indicating personal service, and made it the subject of a motion to quash. Defendant thereby assumed the burden of submitting to the court affidavits or evidence sufficient to impeach the return. This, he did not do, and, in the absence of any support for defendant's motion to quash, it was denied on December 22, 1959, ex parte. The petition filed in July discloses no adequate explanation for defendant's lack of diligence in pursuing his motion or in seeking prompt redress after the court's adverse ruling.

Whether defendant's negligence in this regard be considered as precluding relief under Section 72, or whether the December order be considered as res judicata, the end we reach is the same. As to the former principle, see Brockmeyer v. Duncan, 18 Ill. 2d 502, 505. As to the latter rule, see Heiser v. Woodruff, 327 U.S. 726 and Chicago Title & Trust Co. v. Storage Co., 260 Ill. 485, 493, where it was held that the prior adjudication determined not only all matters litigated and decided, but also all relevant issues which could have been decided. (I.L.P. Judgments, Ch. 13, § 378; Chicago & Western Ind. R. Co. v. Alquist, 415 Ill. 537.) We conclude, therefore, that the portion of the order quashing service of



-6-

summons should be reversed, and upon remand defendant should be given a reasonable opportunity to answer and defend.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED WITH DIRECTIONS TO PROCEED IN ACCORDANCE WITH THE VIEWS HEREIN EXPRESSED.

MURPHY, P.J., and BURMAN, J., concur.

PUBLISH ABSTRACT ONLY.

HOLGER HANSON, doing business as)
HOLGER HANSON DECORATING SERVICE,)
Appellant,) APPEAL FROM
v.) MUNICIPAL COURT
SHERIDAN-BELMONT HOTEL COMPANY, a) OF CHICAGO.
corporation,)
Appellee.)

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Holger Hanson, a painting contractor, sues for a \$7100 balance alleged to be due him for decorating done in the hotel of defendant, Sheridan-Belmont Hotel Company. At the close of plaintiff's case, judgment was entered for defendant, and plaintiff appeals.

The principal question is whether the trial court, at the close of plaintiff's case, abused its discretion by denying leave to plaintiff to file instanter a reply to defendant's answer, which alleged an affirmative defense.

Plaintiff was engaged by defendant to wash and paint certain rooms and apartments in defendant's hotel. Plaintiff was to work on a credit basis and to bill defendant for rooms completed, and defendant was to pay these bills the following month. On August 1, 1958, there was due plaintiff \$49,132 for work done. As of August 25, 1958, plaintiff accepted defendant's \$19,532 check and defendant's twelve negotiable promissory notes totaling \$29,600 in payment of the \$49,132. The notes were payable at the rate of \$2500 per month for eleven months and \$2100 for the twelfth and final month, with interest at the rate of 5%.

per annum. Nine of the twelve notes were paid with interest, and the last three notes, for the total sum of \$7100, remain unpaid.

On October 2, 1959, plaintiff filed suit on the three unpaid notes plus interest. Defendant answered, alleging that the notes had been given in payment for decorating services; that subsequently defendant discovered plaintiff's work was so shoddy, inferior, and unworkmanlike as to constitute a total failure of consideration, of which defendant had advised plaintiff, and although repeatedly requested, plaintiff failed and refused to correct the faulty decorating.

On January 6, 1961, plaintiff amended his statement of claim by filing Count II, in which it is alleged that on August 25, 1958, an account was stated between plaintiff and defendant in the sum of \$49,132, and "there remains due to Plaintiff on said account stated the sum of \$7100.00 plus interest." Defendant's answer to Count II is basically the same as the answer to Count I. No reply was filed by plaintiff to either of defendant's answers to Counts I and II.

During the pleading stage, the court denied plaintiff's motion for a bill of particulars, but ordered defendant to answer interrogatories, which sufficiently detail and particularize the apartments and the faulty and inferior decorating complained of by defendant.

In a nonjury trial, plaintiff proceeded on Count II of the statement of claim, and presented his evidence purporting to prove a *prima facie* case of account stated. The trial court

ruled that plaintiff had not proved an account stated and indicated it would proceed to consider the issues under Count I, based on the promissory notes. As the execution of the notes was not denied, and in order to place the burden of proof on defendant, plaintiff asked leave to file instanter a reply to defendant's affirmative defense answer. The court ruled that the motion came too late and entered "judgment for the Defendant based on the pleadings and on his answer."

Plaintiff contends that the statement of claim sets out two separate causes of action, Count I being an action on the notes and Count II being an action of account stated; that he elected to proceed under Count II, believing that no reply was necessary to defendant's answer to Count II for the reason that failure of consideration is not a defense in an action for account stated; that plaintiff's evidence made out a prima facie case of account stated, and plaintiff was entitled to judgment on the pleadings and proof; and that he was caught by surprise when the court ruled against him on Count II, and it then became imperative to file a reply to defendant's answer to Count I in order to avoid an admission of failure of consideration. Plaintiff argues that the court erred and abused its discretion in not allowing plaintiff to file a reply, as there would have been no hardship and it would have "forced the Defendant to proceed to trial on the merits."

The court was correct in its ruling that the evidence introduced by plaintiff was insufficient to show an account stated. The proof showed a settled account. (1 Am. Jur.2d §21,

p. 396.) The twelve notes for \$29,600 and defendant's check for \$19,532 were received in payment and satisfaction of the amount due by defendant on August 1, 1958, of \$49,132. The account was merged in the notes and no longer had an existence as a legal demand against defendant. Collins v. Makepeace, 13 Ill. 478 (1859); 1 C.J.S. (Account Stated) §59(a), pp. 740-741.

Plaintiff's proper action was based on the unpaid notes, and plaintiff initially should have proceeded under Count I. As defendant's answer to Count I alleged a good affirmative defense, a reply by plaintiff was necessary (Civil Practice Act, §40(2)) in order to require defendant to proceed to prove his affirmative defense. As no reply was filed, defendant's allegations "not explicitly denied" were "deemed to be admitted" at that posture of the trial. Nevertheless, the court, "for good cause shown," could have allowed plaintiff's motion to file a reply instanter, in order to deny defendant's affirmative defense. Supreme Court Rule 8(5).

What constitutes "good cause," to warrant an extension of time for the filing of a past due pleading, cannot be determined by any exact or rigid rule. Of necessity, and in the interest of justice, the trial judge has broad discretion in permitting or denying the filing of past due pleadings or amendments. A court of review will not interfere with the ruling of the trial court unless there has been a manifest abuse of this discretion. (Lowrey v. Malkowski, 20 Ill.2d 280, 285 (1960).) The test to be applied in determining whether such discretion was properly exercised is "whether it furthers the ends of justice." Deasey v. City of Chicago, 412 Ill. 151, 156 (1952).

The record indicates that, at the time plaintiff requested leave to file his reply instanter, the court made no inquiry, and the defendant made no showing, that the tardy filing of the reply would cause inconvenience or hardship. The colloquy between court and counsel indicates that plaintiff's attorney believed that issue had been joined without the necessity of a reply, because of remarks made by the court during the hearing on plaintiff's motion for a bill of particulars.

Plaintiff had furnished labor and material to defendant on a large scale over a considerable period of time. Defendant was unable to pay as agreed, and when plaintiff accepted notes in payment of the sum then due no complaint was made as to the quality of work done. Defendant contends that this information developed later and before the last three notes were paid. There is nothing in the record to show that the cost of correcting the alleged faulty work and material is equal to the balance due on the notes, other than a general statement that there was a "total failure of consideration for said notes." A trial may show that plaintiff may have a balance due after defendant has been given credit for alleged faulty work.

We do not condone the disregard of rules of pleading and the fruitless expenditure of time and effort by the court and litigants caused by mistaken theories of remedies. Nevertheless, we believe the circumstances of this case are such that the "ends of justice" would have been furthered by permitting plaintiff to file a reply instanter, in order that the trial might have proceeded on the merits of defendant's affirmative defense.

For the reasons stated, the judgment for defendant is reversed and the cause remanded with instructions to permit plaintiff to file a reply to defendant's answer to Count I of the statement of claim and for such other proceedings as may be consistent with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

BURMAN and ENGLISH, JJ., concur.

Abstract only.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

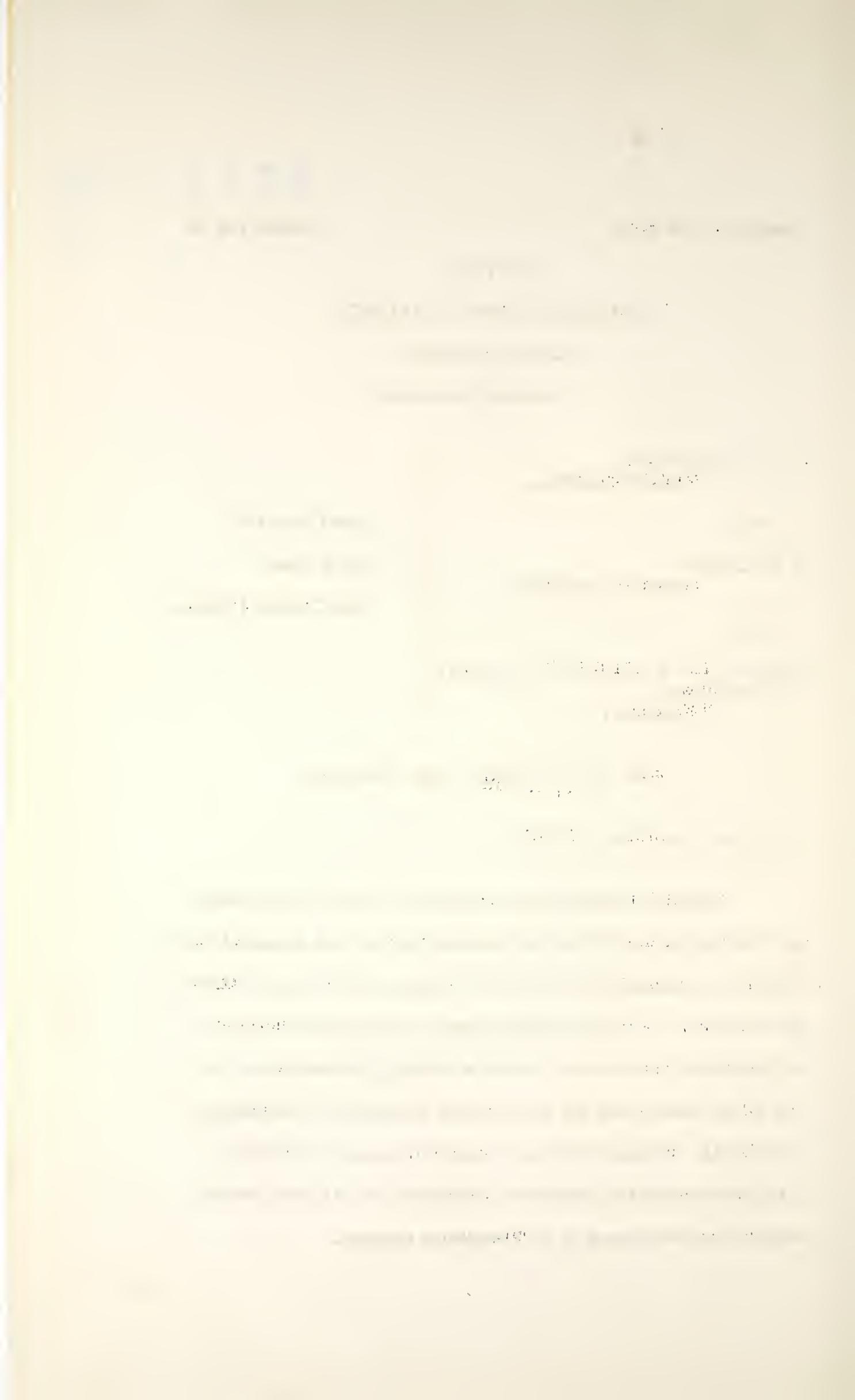
February Term, 1962

P. J. PFLASTERER,)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the
)	
J. E. CASSIN,	)	Circuit Court,
Defendant-Appellant,)	
	)	White County, Illinois.
and)	
)	
ASHLAND OIL & REFINING COMPANY,)	
a Corporation,)	
Defendant.)	

Hon. Roy C. Gulley, Judge Presiding.

HOFFMAN, PRESIDING JUSTICE

Plaintiff Pflasterer sued defendant Cassin for an account-ing, alleging that in 1957 he and defendant agreed that defendant was to aid him in raising finances for the drilling and producing of wells for oil and gas. He further alleged that in consideration therefor, the defendant Cassin was to receive a working interest free of any cost to the casing point but was to share in the cost of completion of the wells. Plaintiff in his suit sought a lien upon the interest of the defendant in the equipment, machinery and oil runs, for defendant's pro rata share of the completion charges.



The trial court, sitting without a jury, heard the evidence, and found for the plaintiff in the sum of \$13,533.34. The decree provided that the plaintiff was entitled to an equitable lien on the defendant's interests in the equipment and in the oil runs. It is from this order of the trial court that defendant appeals. The issue raised is one of fact.

It was agreed that the defendant was not obligated to pay any of the drilling costs, and that he has paid his share of the operating charges. The issue in the case is thus narrowed down to whether or not he had to pay any of the costs of completing and equipping the well after it was determined that a well was a producer. The defendant's position is that he did not agree to pay such costs, as he claims it was understood that his interests were free into the tank. The amount of the expense is not in dispute.

In April of 1957, Pflasterer approached Cassin and sought his help in selling working interests in a lease plaintiff owned. Defendant Cassin agreed and a short written memorandum was prepared wherein it was stipulated that plaintiff "agrees to give" defendant a "1/8 interest in all oil wells developed" on the property, provided defendant could produce a certain amount of investors. It was further provided that plaintiff would give defendant a "similar agreement or arrangement" on all property under lease by him. The well under this lease was dry and no completion costs were involved.

Five months afterwards, plaintiff again saw defendant and asked his help in getting financial assistance on other leases. This time, their agreement was verbal. Defendant was to receive one-half of all working interests not sold or transferred on a 50-50 basis with plaintiff. The prior written agreement wasn't mentioned.

Leases were developed in 10 acre tracts--each well being a separate deal and separately completed. If the well was a producer, plaintiff made assignments to the various purchasers of working interests, including an assignment to defendant for his part of what was left. The well was then completed and equipped for production, each purchaser being billed for a pro rata share of such costs. It is for a share of these costs that plaintiff brought this action against the defendant.

From September, 1957 to September, 1958, nineteen wells were drilled, all upon leases acquired by plaintiff in his own name. Nine were producers. Both parties made sales of working interests. Completion and equipment costs were to be paid by the purchasers of the working interests in addition to the price they paid for their interests.

The assignments from plaintiff to defendant were of three types. In 5 of the 9 assignments, it was expressly stipulated that defendant was to pay a pro rata share of the costs of equipping and completing the wells. The other 4 assignments did not contain such a clause.

The plaintiff testified that they "agreed that he would get half of what was not sold and pay no cost of drilling, but would pay his part of equipping and completing cost." Defendant testified that he "did not tell him I would pay for equipment." The wife of each testified in partial support of their husband's case, but the testimony was negative in nature. While defendant claimed he had never been approached for completion costs by the plaintiff before the suit was filed, there was introduced in evidence a letter from plaintiff's attorney written to defendant in December of 1958 requesting completion expenses. There was also in evidence a letter from an attorney, in reply, denying defendant owed any money. The testimony of the parties and their wives, the evidence of the assignments containing the clause of payment, and the evidence of the collection letters referred to, constituted substantially the entire evidence in the case as to the agreement. The evidence, as might be expected, was not necessarily conclusive of the contention of one or the other.

The determination of this case depends upon the facts in the record. In a non-jury case such as this, this court will not substitute its judgment as to the credibility of the witnesses for the trial court's judgment, nor will it disturb the trial court's findings unless they are manifestly contrary to the weight of the evidence. The conclusions, where the cause is heard by the court without a jury, are entitled to the same weight as a jury verdict.

The trial judge in this case heard the testimony of all of the witnesses and was able to observe their demeanor while testifying. We have carefully examined the abstracts and briefs and we cannot say that the record does not support the findings and conclusions of the trial judge, who is not inexperienced in these matters.

We hold that the decree and judgment appealed from is not contrary to the manifest weight of the evidence, and it is, accordingly,

Affirmed.

Scheineman, J., and Culbertson, J., concur.

Publish Abstract only.

FILED
10-21-1962
James G. Maran
CLERK OF THE APPELLATE
FOURTH DISTRICT OF ILL.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1962

Term No. 62-F-20

Agenda No. 19

WILLIAM G. PATTON, As Administrator)
of the Estate of William Dallas)
Patton, Deceased,)
)
 Plaintiff-Appellant,) Appeal from the
) Circuit Court of
 vs.) Madison County,
) Illinois
 HOMER WALLACE,)
)
 Defendant-Appellee)

CULBERTSON, J.

This is an appeal by the Plaintiff from an adverse judgment entered in favor of the Defendant. This cause was tried in the Circuit Court of Madison County by the Court without the intervention of a jury. At the close of the plaintiff's evidence the finding in favor of the defendant was made.

Plaintiff, William G. Patton, as Administrator of the Estate of William Dallas Patton, deceased, brought an action against the Defendant to recover damages for the wrongful death of plaintiff's intestate occasioned by the alleged negligence of the defendant in shooting plaintiff's intestate, which resulted in plaintiff's intestate's death.

Plaintiff in his complaint alleges that while the plaintiff's intestate was ascending the east side of a levee along the Mississippi River in Alton, Illinois, the defendant negligently and carelessly shot and discharged a pistol inflicting a wound upon plaintiff's intestate which proximately caused or contributed to cause his death. Defendant by his answer admits the shooting but denies the shooting was done negligently. Defendant in his answer further alleges the shooting was done lawfully and further that the wound did not proximately cause the death of the plaintiff's intestate.

The evidence produced on the hearing of this cause may be fairly summarized as follows:

A boy, William Patton, plaintiff's intestate, was running over a Mississippi River levee on the evening of July 21, 1957, when he was shot in the back of the left leg by the Defendant, an Alton policeman. The Defendant was about 150 feet away when he fired at the boy. The boy got to his feet and continued on over the levee and ran almost 700 feet and into the river, ending up under a barge. He was pulled from the river dead about 45 minutes later. A doctor who performed an autopsy on the boy on August 12, 1957, testified at the trial, that the bullet wound might or could have caused the death of the plaintiff's intestate. No evidence tended to establish any legal justification for the defendant's shooting the boy, nor does the evidence viewed favorably for the Plaintiff, show as a matter of law that the boy was guilty of contributory negligence.

The question presented here for review is whether the evidence, viewed most favorably for the Plaintiff, established a cause of action in such situations as is presented here. Where only the evidence for the Plaintiff has been heard, the question on review is whether the plaintiff's evidence proves the elements necessary to establish a cause of action. *City of West Frankfort v. Fullop*, 6 Ill. 2d 609; *Fewkes v. Borah*, 376 Ill. 596.

The motion at the close of the plaintiff's case admits all the facts and all reasonable inferences that can be drawn therefrom, and all evidence to the contrary must be disregarded. *Continental Illinois National Bank v. National Casket Company*, 27 Ill. App. 2d 447; *Spitzer v. Bradshaw-Praeger & Co.*, 10 Ill. App. 2d, 445.

Viewing the evidence in this case and applying thereto the established law of this State it is our judgment that the trial court erred in finding for the Defendant and this case will therefore be and same is hereby reversed and remanded to the Circuit Court of Madison County for retrial.

Reversed and Remanded.

Hoffman, P.J., and
Scheineman, J. Concur.

Publish Abstract only.

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